Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PATRICIA PERKINS-AUGUSTE, Council President,

Petitioner,

v.

ARMENIO T. MONTEIRO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATED COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the president of a municipal legislative body is entitled to qualified immunity in relation to her ruling a fellow councilperson out of order and asking for his removal from the council chambers by Sergeant-at-Arms Police Officers, and if by so doing the council president's actions violated a clearly established constitutional right, were not objectively reasonable and that the council president's unconstitutional motive was the proximate cause of the constitutional violation.

LIST OF PARTIES

The parties below are listed in the caption. In addition the City of Elizabeth, Police Officer Cox and Sergeant of Police Richard Meola appeared as defendants in the District Court action but were not participants in the appeal to the Third Circuit.

Patricia Perkins-Auguste

Armenio T. Monteiro

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The Opinion and Order of the United States District Court for the District of New Jersey denying defendants' motion for summary judgment dated November 12, 2003 is reproduced at App. D at 58a.

The December 23, 2003 Opinion and Order of the United States District Court for the District of New Jersey denying Defendant, Patricia Perkins-Auguste's motion to certify the court's November 12, 2003 Order for appeal is reproduced at App. C at 48a.

The September 1, 2004 Opinion and Order of the United States District Court for the District of New Jersey denying Defendant, Patricia Perkins-Auguste's motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 is reproduced at App. B at 31a.

The March 6, 2006 Order of the United States Court of Appeals for the Third Circuit denying Appellant rehearing and rehearing by the court en banc is reproduced at App. E at 93a.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Order of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on February 8, 2006. The Appellant filed a Petition for Rehearing and Rehearing En Banc which was denied by the Third Circuit on March 6, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution and Title 42 United States Code Section 1983.

STATEMENT OF THE CASE

On April 10, 2001, Patricia Perkins-Auguste was an elected councilwoman in the position of Councilwoman-At-Large for the City of Elizabeth in the State of New Jersey. Elizabeth is the fourth largest City in the State of New Jersey. On the forementioned date, the petitioner served as President of the Elizabeth City Council and Armenio T. Monteiro was an elected councilman from the Fifth Ward of the City of Elizabeth.

The Elizabeth City Council met on April 10, 2001 to adopt the municipal budget. As President of the City Council, Petitioner was responsible for chairing City Council meetings in accordance with "City Council Rules of Procedure" as adopted by the City Council of the City of Elizabeth on March 28, 1961. It was the procedure of the Council to have all council people speak prior to the vote on the budget. When it was his turn to speak Councilman Armenio Monteiro

expressed his opposition to the budget and spoke virtually uninterrupted for twenty-four minutes.

Following Mr. Monteiro's remarks, the councilman from the Sixth Ward spoke. Upon completion of the Sixth Ward Councilman's remarks, all council people had spoken with the exception of the petitioner. It was the custom of the Elizabeth City Council for the President of the Council to speak last.

Immediately after Ms. Perkins-August began to speak, councilman Monteiro interrupted her because he disagreed with the content of her speech. The petitioner exercised her power as President of the Council and ruled the respondent out of order. The respondent refused to be quiet, continuing to speak and interrupting the petitioner from exercising her right to express her opinion.

The petitioner made several attempts to bring the meeting to order. Ms. Perkins-August asked Mr. Monteiro to leave the council chamber so she could complete her remarks. Mr. Monteiro refused to stop talking and refused to abide by the Council President's ruling advising the members of the City Council that he would not leave the chamber. Two Elizabeth police officers serving as Sergeants-At-Arms requested Mr. Monteiro to abide by the Council President's orders. Mr. Monteiro advised the police officers that he would not comply nor would he leave the council chamber unless he was arrested.

Officer Andrew Cox made the decision that the meeting could not move forward and decided to arrest Mr. Monteiro. This was done notwithstanding the fact that petitioner directed the Officer not to arrest Mr. Monteiro. The police

officers explained to the petitioner that it was their decision to arrest Mr. Monteiro and he was now under their control. Mr. Monteiro was charged with a violation of N.J.S.A. 2C:33-8, disrupting a public meeting. The complaint was signed by the arresting officers and not the petitioner. A municipal court trial was conducted. The municipal court judge rendered a decision finding respondent not guilty.

A. Armenio Monteiro's Complaint

Armenio Monteiro filed a complaint against the City of Elizabeth, Patricia Perkins-Auguste, Council President, Andrew R. Cox, Police Officer and Richard Meola, Sergeant of Police. Mr. Monteiro's complaint included 11 causes of action. Mr. Monteiro voluntarily dismissed all State law claims and proceeded only regarding his federal claims which were Count One (actions of defendants violate Monteiro's first amendment rights under the U.S. Constitution). Count Two (actions of the defendants violate Monteiro's procedural and substantive due process rights under the United States Constitution), Count Four (Defendants actions constitute false imprisonment and false arrest) and Count Five (Defendants actions violate plaintiff's right to privacy).

B. The Decision Below.

All defendants filed motions for summary judgment which were heard by Judge Jose Linares. Judge Linares dismissed plaintiff's complaint as to the City of Elizabeth since there was a failure of plaintiff to prove any custom or policy by the City of Elizabeth of constitutional violation.

Judge Linares dismissed plaintiff's claims against officers Cox and Meola finding that "it is certainly reasonable

to believe that plaintiff was purposely 'disrupting' the City Council meeting and 'obstructing' it from proceeding." 71a Judge Linares found that no reasonable police officers would believe that their conduct violated plaintiff's clearly established rights, and therefore, under the circumstances of this case their actions are entitled to qualified immunity. 71a

Judge Linares found that Council President Perkins-Auguste was not entitled to absolute immunity.

The Court found that Patricia-Perkins Auguste was not entitled to qualified immunity stating that there was a material question of fact as to whether petitioner's motive for acting against Monteiro resulted from the content of his speech or was an appropriately limited time, place and manner restriction. 84a

On December 1, 2003, petitioner moved to file a motion with the District Court to certify the issues for appeal intending to take the matter to the Third Circuit. Judge Linares entered an Order denying petitioner's request for certification to appeal. Appendix C

On March 16, 2003, a trial commenced in this matter. A jury verdict was delivered on March 22, 2004. On April 8, 2004, petitioner filed a motion for judgment as a matter of law and motion for a new trial. On September 3, 2004, Judge Linares entered an Opinion and Order denying Appellant's motion for judgment as a matter of law and a motion for a new trial. Appendix B

The decisions of the District Court were appealed to the United States Court of Appeals for the Third Circuit. An Opinion of the Third Circuit was entered on February 8, 2006 by Judges Slovitar and Rosen with Judge Fisher dissenting. Appendix A

REASONS FOR GRANTING THE PETITION

This case presents an important issue of Federal Law on which the decision of the Third Circuit conflicts with Supreme Court precedent and the holdings in other circuits.

A review is warranted to resolve a conflict between improper intent, causation and restrictions on First Amendment Rights.

The analysis of qualified immunity and public officials was deftly analyzed by the Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) 73 Law Ed. 396, 102 Supreme Court 2727. Where the Court stated

> . . . bare allegations of malice should not suffice to subject government officials to the costs of trial or to the burdens of broad–reaching discovery. We, therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id at 818.

The *Harlow* court recognized that in order for public officials to act for the furtherance of legitimate public goals where a right is not clearly established the public official will not be held liable for their actions. *Id.* at 819. The standard enunciated in *Harlow* was one of objective reasonableness.

This objective reasonableness standard was discussed vis a vis a motive based tort by the Supreme Court in *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998). The Court in *Crawford-EL* discussed the proposition that where a claim depends on proof of an official's motive the qualified immunity analysis as enunciated in *Harlow* would not automatically bar such a case. The *Crawford-El* Court believed that a plaintiff could defeat a summary judgment motion by proving the pertinent motive. *Id.* at 600. However, in clarifying the extent to which motive based torts against public officials may proceed to trial the court stated.

> When intent is an element of a constitutional violation, however, the primary focus is not on any possible animus directed at the plaintiff; rather it is more specific such as an intent to disadvantage all members of a class that includes the plaintiff, *see, e.g., Washington v. Davis*, 426 U.S. 229, 239-248, 48 L. Ed. 2d 597, 96 S. Ct 2040 (1976) or to deter public comment on a specific issue of public importance.

Id. at 592.

The decision by petitioner to ask for Mr. Monteiro's removal from the meeting was not directed at any class of people or even to silence the position of a class. It was undisputed that councilman Monteiro had over 20 minutes of uninterrupted time to speak on behalf of himself and/or his constituents as it pertained to the budget of the City of Elizabeth. At the point of disruption, Mr. Monteiro was not speaking on a matter of public importance but was interrupting the Council President as she discussed a political

flyer. The District Court incorrectly failed to discern that Mr. Monteiro's speech at the time of the incident and Ms. Perkins-Auguste's response did not limit protected speech. The District Court found that "the nature of the First Amendment violation alleged in this case was not clearly expressed by plaintiff. The claim appears to be based on his expulsion from the City Council meeting, an act which precluded him from continuing to express his views on the annual budget at a public forum" 76a

The District Court denied summary judgment even though the respondent's First Amendment claim was not clearly established. The *Crawford-El* Court recognized that summary judgment is appropriate if there is "doubt as to the illegality of the defendant's particular conduct (for instance, whether a plaintiff's speech was on a matter of public concern). *Id.* at 593.

It is the contention of the petitioner that Mr. Monteiro was not speaking on an area of public concern but rather was disrupting the petitioner because she was discussing a political flyer put out by Mr. Monteiro. The District Court erred on the threshold issue of finding Mr. Monteiro's speech a matter of public concern.

Even if the Court finds that the speech was protected, to succeed a plaintiff must prove the official conduct was violative of the law. In discussing cases involving unconstitutional motive, the *Crawford-El* Court recognized that "the immunity standard in *Harlow* itself eliminates all motive-based claims in which the official's conduct did not violate clearly established law." *Id.* at 776.

A. The petitioner did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

A plaintiff must aver with requisite specificity and facts the right which the public official violated. The court in *Anderson v. Creighton*, 483 U.S. 635 (1987), 107 S. Ct. 3034; 97 L. Ed. 523, recognized that the test of clearly established right is not applied at a level of generality. *Id.* at 639. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640.

Harlow removed from qualified immunity the subjective analysis. Courts have since incorporated into the qualified immunity analysis a subjective component of the actor's state of mind or motive to the underlying civil rights claim. It is crucial to note, however, that the motive of the actor does not abrogate qualified immunity. "A district court could conclude (as could a court of appeals) that even assuming that a public official acted with the improper intent, a reasonable public official would not have known that his or her specific conduct, taken with the intent, violated clearly established law." *Grant v. City of Pittsburgh*, 98 F.3d 116, 126 (3d Cir. 1996) The intent of Patricia Perkins-Auguste may be a question of fact for a jury but it was first the obligation of the court to determine if a reasonable public official would have known that his or her actions violated clearly established law.

Armenio Monteiro's complaint was filed against the City of Elizabeth, Patricia Perkins-Auguste, Council President, Andrew R. Cox, Police Officer and Richard Meola, Sergeant of Police. All of the defendants filed motions for summary

judgment which were heard before Judge Linares of the United States District Court for the District of New Jersey. Officer Cox and Meola asserted in their motion that they were entitled to qualified immunity. Officer Cox arrested Monteiro and signed a complaint against him for disrupting a public meeting.

Judge Linares remarked that it was not entirely clear from the statements by plaintiff's counsel at oral argument what claims the plaintiff was pursuing against the officers but that notwithstanding the court assumed that the plaintiff was asserting a false arrest claim against the officers. 65a Judge Linares did consider the possibility that plaintiff's other constitutional claims may be indirectly alleged against the defendant police officers. The District Court found that any constitutional claims against the officers would be defeated. "To the extent that these other constitutional claims are indirectly alleged against defendants Cox and Meola, this court grants summary judgment. Plaintiff's mere unsubstantiated allegations are insufficient to defeat summary judgment." 65a n.3

Therefore, to establish a claim for unlawful arrest, the plaintiff had to prove that the arrest was made without probable cause. In determining whether or not the officers had probable cause to arrest Mr. Monteiro, the court had to review the facts in an objective fashion to determine the reasonableness of the officers' conduct. After having done so, Judge Linares concluded,

> A plain reading of the statute and rules also indicates the reasonableness of the officers' decision to arrest plaintiff. Based on the undisputed events, it is certainly reasonable to believe that the plaintiff was purposely 'disrupting' the City Council meeting and

'obstructing it from proceeding'. This court's review of the videotape of the meeting showed that defendants arrested the plaintiff only after he had repeatedly refused to comply with several verbal warnings. Despite warnings to settle down, plaintiff purposefully and repeatedly interrupted the Chair of the Council when it was the Chair's proper turn to speak. He was informed that his failure to quiet down would lead to his expulsion from the meeting. As a result, the meeting was at a standstill and unable to proceed. The videotape clearly shows Defendants Cox and Meola behaving courteously towards plaintiff and aware of a presumably valid request of Ms. Perkins-Auguste, an official presiding over a public hearing. The 'totality of circumstances' demonstrates to this court that no reasonable police officer would believe that their conduct violated plaintiff's clearly established rights, and therefore, under the circumstances of this case, their actions are entitled to qualified immunity.

71a

Judge Linares states in Footnote 5 of his opinion,

Plaintiff's false arrest claim is not addressed toward Defendant Perkins-Auguste and to any degree it was, the claim fails for the same reason it failed against the Defendant Cox and Meola, as Defendant Perkins-Auguste was within her discretion and had probable cause to direct the officers to remove the plaintiff from the proceedings. In as much as plaintiff's due process

> claims are intertwined with the right to privacy claim, they are addressed later in this opinion.

After having made such findings the conclusion of the District Court that Patricia Perkins-Auguste is not entitled to qualified immunity is flawed. The District Court ruled that it was reasonable for the officers to believe that Mr. Monteiro was disrupting the meeting and therefore they are entitled to qualified immunity regarding that arrest. Judge Linares similarly states that it was reasonable and Defendant Perkins-Auguste had probable cause to arrest plaintiff if there was a false arrest claim made against her. Based upon the court's analysis it was reasonable to believe that Monteiro was purposely disrupting the City Council meeting and obstructing it from proceeding.

Notwithstanding those findings, the District Court denied Perkins-Auguste's motion for summary judgment stating that the issue of her motive must be decided by a jury. The court, however, failed to make the legal determination necessary before allowing this matter to proceed to a jury. "It is now widely understood that a public official who knows he or she is violating the Constitution nevertheless will be shielded by qualified immunity if a reasonable public official would not have known that his or her actions violated clearly established law." *Grant v. City of Pittsburg*, 98 F.3d 116, 124 (3d Cir. 1996). Pursuant to the facts of this case, the District Court found that a reasonable public official would find that the plaintiff was disruptive, obstructive, failed to heed warnings from police officers to settle down and was informed that his failure to quiet down would lead to his expulsion from the meeting, and therefore probable cause existed for an arrest and probable cause existed for a government official to ask for the arrest. However, the

District Court found that the same government official would not be objectively reasonable to rely on the same set of facts to request that Mr. Monteiro be removed from the meeting. Mr. Monteiro had an opportunity for over 20 minutes to express his views on the budget and to participate in all discussions. It was no longer his turn to speak, yet he interrupted the council president during her session. No reasonable public official would believe that they were impinging upon the First Amendment rights of Mr. Monteiro to speak on an issue of public importance when he was merely interrupting and not agreeing with the council president's position.

In *Sheppard v. Beerman*, the United States Court of Appeals for the Second Circuit had to address how the subjective motive of an employer relates to the qualified immunity defense. The Second Circuit developed a rule where an employer is alleged to have terminated an employee based upon unconstitutional motive.

> Upon a motion for summary judgment asserting a qualified immunity defense in an action in which an official's conduct is objectively reasonable but an unconstitutional subjective intent is alleged, the plaintiff must proffer particularized evidence of direct or circumstantial facts . . . supporting the claim of an improper motive in order to avoid summary judgment.

Sheppard v. Beerman, 94 F.3d 826, 828 (2d Cir. 1996) citing *Blue v. Koren*, 72 F.3d 1075, 1084 (2d Cir. 1995).

The Third Circuit majority relying on *Lucurto v. Safir*, 264 F.3d 154, 169 (2d Cir. 2001), espouses that if Perkins-

Auguste acted with an intent to suppress Monteiro's speech on the basis of viewpoint, she violated clearly established law and is not entitled to qualified immunity. In cases where a constitutional violation depends on evidence of a specific intent, "it can never be objectively reasonable for a government official to act with the intent as prohibited by law." citing *Lucurto v. Safir*, 264 F.3d 154,169. The majority found that the District Court did not err since Perkins-Auguste's motivation was the determinative factor as to whether or not a clearly established law was violated. This holding is in conflict with the Supreme Court in *Crawford-El v. Britton*, wherein the Supreme Court stated that existence of unconstitutional motive does not automatically move a case to trial. *Crawford* at 592.

The Fourth Circuit in *Collinson v. Gott* addressed a scenario similar to the one case *sub judice*. In *Collinson*, Mr. Collinson appeared at a public meeting at the Maryland Board of Commissioners. John Gott was the President of the Board of Commissioners, Calvert County Maryland. Collinson stood up to speak, began addressing issues not on the agenda and he was ruled out of order. Gott asked the deputy to remove Mr. Collinson from the meeting which he did. Collinson later brought a 1983 action against Gott for a violation of his First Amendment rights and Gott filed a motion for summary judgment seeking qualified immunity. In discussing the issue, the Fourth Circuit turned for direction to *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988) wherein the Tenth Circuit stated, "Where the defendants subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonable of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the officials actions were improperly motivated." *Collinson* at 649

Monteiro failed to point to specific evidence that Perkins-Auguste's actions were improperly motivated. The assumptions relied upon by the District Court were incorrect. Judge Linares argues that on one hand it would be reasonable to believe that Perkins-Auguste's conduct was to promote the orderly procession of business but on the other hand Perkins-Auguste may have been acting with ill motive towards plaintiff's political position. 84a The assumption fails to recognize the fact that the plaintiff had already spoken for over 20 minutes on that position and that the content of Monteiro's speech at the time of the disruption was not relevant to that issue. Moreover, the court already concluded that a reasonable objective official would be justified to remove Mr. Monteiro for disruption of a public meeting. If that objective standard is met, any alleged ill motive is no longer relevant. This scenario as in the *Collinson* case

> leads to the ultimate question whether a reasonable person in Gott's position, i.e., one, motivated only to ensure orderly conduct of the meeting, reasonably could have believed that ruling Collinson out of order and having him evicted was justified as a reasonable time, place, and manner restriction, hence not a violation of his constitutional rights. The answer to this is plainly 'yes'.

Id. at 103. The *Collinson* court recognized that the conduct of Gott did violate Collinson's asserted rights. The question was whether a reasonable person would have believed that he was committing such a violation. The Fourth Circuit recognizes,

> It is hard to imagine circumstances in which the tolerance commanded by immunity doctrine for possible mistakes of judgment by public officials is more appropriate and necessary than those

> confronted by officials presiding over potentially explosive public hearings. Typically, untrained and inexperienced in a difficult business of presiding and applying rules of order in fast moving situations of tense political controversy, such officials are particularly fit subjects for the protections afforded by qualified immunity.

Id. at 104.

The issue of Perkins-Auguste's subjective intent or motivation is irrelevant as to whether or not an objective person in Ms. Perkins-Auguste's position would have recognized that she was violating a clearly established right. It is clear that an objective reasonable official in Perkins-Auguste's position would not have known that she was violating a clearly established right and therefore she is entitled to qualified immunity as a matter of law.

B. The Court failed to recognize that even if improper motive is present, Mr. Monteiro must prove that there is causation between the improper intent and restriction of speech.

Judge Linares ruled as a matter of law that the defendant police officers had probable cause to arrest the plaintiff. Judge Linares found that it was reasonable to believe that Mr. Monteiro was purposely disrupting the City Council meeting and obstructing it from proceeding. The Court in *Crawford-El v. Britton*, 523 U.S. 574, 593, declared,

> proof of an improper motive is not sufficient to establish a constitutional violation . . . There must also be evidence of causation. Accordingly, when

> a public employee shows that protected speech was a 'motivating factor' in an adverse employment decision, the employer still prevails by showing that it would have reached the same decision in the absence of protected conduct.

Id.

The subjective state of mind analysis is utilized in the first step of qualified immunity analysis that being "whether plaintiff's allegations, if true, established a constitutional violation." *Mihos v. Swift*, 358 F.3d 91, 104 (1st Cir. 2004). The District Court and Third Circuit Court of Appeals failed to recognize this distinction. Moreover, the court must come to a conclusion that the protected conduct was a substantial factor in the constitutional violation. In the context of an employment action the *Mihos* court found that "In short, the issue is the causal link between the protected conduct and the adverse employment action." *Id.* at 108

In reaching any judgment in this matter, it is essential that the court look to the proximate cause of the restriction. The court in *Mt. Healthy* acknowledged that, "This court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused." *Mt. Healthy v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). *Mt. Healthy* has been interpreted to deal with the scenario of an official acting with mixed motives, one permissible and one not permissible. The Court in *Tejada-Batista v. Morales*, concludes that "the impermissible ground should be ignored where the employee would have been discharged anyway based on the permissible motive." *Tejada-Batista v. Morales*, 424 F.3d 97, 101 (1st Cir. 2005). "Thus Mt. Healthy comports with the traditional tort-law principle that if

the wrongful act did not cause the injury, the wrongdoer is not liable." *Id.* at 101

In discussing the second prong of the qualified immunity doctrine, the Eleventh Circuit finds that "for the law to be clearly established, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors in the defendant's place that 'what he is doing' violates federal law." *Stanley v. City of Dalton*, 219 F.3d 1280 (11th Cir. 2000) citing *Lassiler v. Alabama A & M Univ. Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994) When analyzing a constitutional violation in the context of an employment action the Supreme Court in *Mt. Healthy* found that the employer is entitled to immunity if they would have reached the same decision even if there had been no protected conduct. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

In order to defeat qualified immunity, Mr. Monteiro was required to demonstrate that a reasonable counsel president acting in the same set of circumstances as Ms. Perkins-Auguste, violated clearly established law and that Perkins-August's improper intent was the proximate cause of the restriction on Monteiro's speech. In *Stanley v. City of Dalton*, an officer sued the police chief and City alleging his termination was in retaliation for the exercise of his First Amendment rights. Discussing qualified immunity and First Amendment rights the court found,

> This objective formulation shields Chadwick [police chief] from suit, even though he in fact committed constitutional violations, provided that a police chief, reasonably, albeit mistakenly, could have believed that his conduct was lawful. In other words, a police

> chief can guess wrong about the constitutionality of his conduct, provided the mistake is a reasonable one.

Stanley at 1244.

The interesting point in *Stanley* is what happens where there are mixed motives, lawful and unlawful. The Eleventh Circuit has established that the presence of a jury issue about a defendant's improper intent does not necessarily preclude qualified immunity. *Foy v. Holston*, 94 F.3d 1528 (11th Cir. 1996). The Court concluded in *Foy* "where the facts assumed for summary judgment purposes in a case involving qualified immunity show mixed motives (lawful and unlawful motivations), and pre-existing law does not dictate that the merits of the case must be decided in plaintiff's favor, the defendant is entitled to immunity" *Id* at 1535.

The Court in this case fails to consider the obvious role of mixed motives on the Monteiro – Perkins-Auguste relationship.

The District Court found

> on the one hand, Ms. Perkins-Auguste's actions taken against plaintiff could be considered her reasonable attempts, consistent with § 3, 13B and 16 of the City's Rules, to prevent plaintiff from continuing to disrupt her and to promote the orderly procession of business . . . On the other hand, a fact finder hearing the history between the parties, the words that were actually said at the meeting and viewing plaintiff's conduct as shown in the videotape could reasonably

> concluded that the plaintiff was not being disrupted and that Ms. Perkins-Auguste's actions were motivated by her antipathy to plaintiff's particular outspoken views on the budget and his alleged sponsorship of the 'offense flyer that attacked the City's budgetary proposal'.

84a The Court acknowledges that there was a unlawful motivation for the ejection of councilman Monteiro from council chambers. More revealing, is that the District Court found that the officers had probable cause to arrest councilman Monteiro for his actions. If the Court were to employ the analysis of the Eleventh Circuit in *Foy*, summary judgment would have appropriately be granted to the petitioner. Likewise, the court did not even touch upon the objective formulation that even if Perkins-Auguste committed a constitutional violation, a council president with the same facts before her could have believed that her conduct first requesting Councilman Monteiro to stop speaking and ultimately asking for Councilman Monteiro's removal was lawful.

Moreover, it is even more reasonable for Ms. Perkins-Auguste to believe her actions were lawful due to the fact that Monteiro was arrested by officers independently and she was specifically told that is was their call to arrest Monteiro. The whole point of qualified immunity is that if the mistake is a reasonable one, the offender is still entitled to that immunity.

Qualified immunity and First Amendment violations have been analyzed by the Supreme Court and the Circuits in myriad context and circumstances. For each of those circumstances there are subtle differences between the rulings

of the courts which make it impossible for a public official like Ms. Perkins-Auguste to conduct city business without the threat of litigation.

The subjective component of qualified immunity as well as cases involving mixed motive are unclear and not consistent. There is no well established precedent to provide proper guidance to public officials. The court's interpretation of causation analysis in qualified immunity cases is not fully born out for the benefit of public official's understanding. In light of the lack of clarity in this realm of law, we urge this Court to grant Patricia Perkins-Auguste's petition and by its review create a necessary standard by which public officials will be protected and able to understand their liability vis a vis First Amendment violations.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED FEBRUARY 8, 2006

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-3756

ARMENIO T. MONTEIRO

v.

CITY OF ELIZABETH; PATRICIA PERKINS-AUGUSTE, Council President; ANDREW R.COX, Police Officer; RICHARD MEOLA, Sergeant of Police

Patricia Perkins-Auguste,
Appellant.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 01-cv-01844)
District Judge: Honorable Jose L. Linares

Argued October 25, 2005

Before: SLOVITER, FISHER, and ROSENN,* *Circuit Judges.*

(Filed: February 8, 2006)

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* The Honorable Max Rosenn, Sr. submitted this opinion to the Clerk's office for processing on February 2, 2006. Prior to the filing of the opinion, Judge Rosenn passed away.

Appendix A

ROSENN, *Circuit Judge.*

This appeal presents the issue of whether, when entitlement to qualified immunity depends on a disputed issue of fact, it is proper to submit that question to a jury. Plaintiff Armenio T. Monteiro filed an action under 42 U.S.C. § 1983 against defendant Patricia Perkins-Auguste, alleging that when he was a member of the Elizabeth, New Jersey City Council, Perkins-Auguste, then President of the Council, violated his First Amendment rights by ejecting him from a public meeting of the Council and having him arrested on a disorderly persons charge on the basis of his viewpoint. Perkins-Auguste asserted that she was entitled to qualified immunity and moved for summary judgment on that ground.

Her motion for summary judgment was denied on the basis that whether she was entitled to qualified immunity depended on a disputed issue of material fact-whether she had Monteiro ejected from the meeting on the basis of viewpoint. The District Court submitted the disputed factual question to the jury, which returned a verdict for the plaintiff, Monteiro, awarding him $10,000 in compensatory damages. The jury also awarded Monteiro $750 in punitive damages, finding that Perkins-Auguste had acted recklessly and with callous indifference to Monteiro's rights.

Perkins-Auguste moved for judgment as a matter of law following the jury verdict under Fed. R. Civ. P. 50, or in the alternative, for a new trial under Fed. R. Civ. P. 59. The District Court denied her motion and entered judgment in favor of Monteiro. She timely appealed. We affirm the judgment because we find no error in the proceedings. The jury's verdict is based on sufficient evidence.

Appendix A

I.

Perkins-Auguste challenges the denial of judgment as a matter of law,[1] the submission of punitive damages to the jury, and the admission of two items of evidence. Perkins-Auguste argues that the District Court erred in denying her motion for judgment as a matter of law on the grounds of qualified immunity because a reasonable official in her position would not have understood that ejecting Monteiro from the meeting violated his First Amendment rights. She further argues that the District Court erred in submitting the question of punitive damages to the jury because Monteiro

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1. Perkins-Auguste styles her appeal as an appeal of the District Court's denials of her motion for summary judgment before trial, her motion for judgment as a matter of law after the close of the plaintiff's case, and her motion for judgment as a matter of law following the adverse jury verdict. We note that it is not clear what rights, if any, Perkins-Auguste retained to challenge the legal determinations the trial judge made at summary judgment, which she did not appeal. If she retained a right to raise a legal question, was that right limited to legal errors made at trial and the sufficiency of the evidence to support the jury's verdict? Or did it continue to extend to the legal questions twice raised in the motions for summary judgment and certification under 28 U.S.C. § 1292(b), and twice decided adversely to the Defendant? The Supreme Court has strongly urged that the legal question of qualified immunity be decided before trial in order to preserve its protections. *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001); *Mitchell v. Forsyth*, 472 U.S. 511, 525-526 (1985). Qualified immunity is " 'an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.' " *Saucier*, 533 U.S. at 200-201 (quoting *Mitchell*, 472 U.S. at 526). We treat her appeal as an appeal of her motion for judgment as a matter of law.

had presented no evidence that she acted intentionally or deliberately to violate his constitutional rights. Perkins-Auguste also argues that it was substantial error for the District Court to admit evidence of Monteiro's acquittal, in municipal court, of the disorderly persons charge, and a City Legal Department Memorandum of Law outlining the procedures to be followed by a Council President in ejecting an unruly member.

II.

On April 10, 2001, the Elizabeth City Council convened for the purpose of considering the City's proposed annual budget. Perkins-Auguste was, at that time, President of the Council and the officer in charge of presiding over the meeting. The meeting was unusually well-attended, with approximately 300 members of the community in the audience. The meeting was taped and broadcast by a local cable station. The members of the Council spoke in turn about their views on the proposed budget.

Monteiro expressed at length his strong objections to the budget, exercising his constitutional right to petition the government on behalf of himself and his constituents. After some discussion from other councilpersons, Perkins-Auguste began to speak. Rather than address the merits of the budget, however, she immediately leveled a pointed attack at Monteiro for what she perceived to be his role in the distribution of a pamphlet protesting the budget and inviting citizens to attend the meeting. The tape reveals that Perkins-Auguste turned toward Monteiro, held up a copy of the pamphlet and stated:

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> I just want to say, this is deception, what was found in the Council chambers. When you tell residents to come up to City Council because they're going to be charged additionally 600 and 800 dollars for owning a home in the City of Elizabeth, this is deception, Councilman Monteiro, with your name on it.

Monteiro interrupted her: "You're bringing up my name. You can't bring up my name and then sit there and. . . ." he began. Perkins-Auguste swiftly ruled him out of order, pounding her gavel. Monteiro continued to try to defend himself, and Perkins-Auguste continued to pound her gavel. Perkins-Auguste then asked two municipal officers, who were acting as sergeants-at-arms, to remove Monteiro from the meeting.

As the officers approached Monteiro, Perkins-Auguste continued her remarks:

> As I was stating, this is deception, when Council members put this type of propaganda throughout the community, when you state there's a 600, an 800 dollar tax increase. My taxes, I own a home in this city, my taxes over the last two and three years only went up twenty-five, thirty dollars for the entire year. So I don't know where you guys are coming off with a thousand dollars, 600 dollars, 800 dollars tax increase. Get the facts straight. If you don't want to vote for the budget, don't vote for the budget, but do not lie to the general population. This is disgusting. If you want

> people to come to the meeting, you tell them to come up because there's something that they need to learn. Do not lie. It's beyond deception.

Monteiro then said: "Well, we'll wait for the bills to come out." In response, Perkins-Auguste exclaimed: "This man cannot keep his mouth shut," and once again asked that he be removed. Monteiro responded that he would not voluntarily leave the meeting, and that, if she wished to have him removed, she would have to have him arrested. As the officers asked Monteiro to step out from his seat, one member of the Council advised that they should "ask for a legal opinion on this," and that "there are rules and regulations in our code that we can adopt right now." Perkins-Auguste did not appear to consult or follow any established procedure in ejecting Monteiro. The evidence introduced at trial reveals that there were at least two possible procedures available to her under the City Council's governing rules. The rules required that the Council vote on the matter of a councilperson's removal.[2] No vote was taken. Monteiro was

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2. A legal memorandum of the City Law Department, dated September 26, 2000, less than a year before the April 10, 2001 meeting, states: "The Rules of Procedure do not provide a specific remedy available to the City Council President if a member fails to comply with the orders of the President after being ruled out of order repeatedly." The memorandum notes, however, that the City Rules incorporate Robert's Rules of Order, which provide the authority to eject an unruly member. The memorandum concludes: "Therefore, it is our opinion that if a member of the City Council repeatedly refuses to comply with the orders and rulings of the President, the member . . . may be ejected . . . by vote of a majority of those Council

(Cont'd)

advised by a City Attorney that he was required to abide by the orders of the Council President, to which he responded, "I apologize, I understand that." Soon thereafter, Perkins-Auguste called a five-minute recess.

When the Council reconvened, Monteiro was still sitting in his Council chair. Perkins-Auguste immediately asked the officers to escort Monteiro out of the meeting. They replied that they could not do so unless he was formally placed under arrest. After some vacillation, Perkins-Auguste agreed. She instructed the officers to place Monteiro under arrest and remove him from the meeting. The officers handcuffed Monteiro and led him from the meeting. Perkins-Auguste then proceeded to speak at length to the audience regarding her actions:

> He filibustered for over twenty-five minutes. Not one Council member opened their mouths. As soon as I speak and others speak, he thinks he can just talk. That is not how this Council will run meetings. It was disgraceful, and I would not put my Council colleagues in it in terms of having them vote on it. That's a decision the President must

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(Cont'd)

members present and voting." In addition, the Rules provide that "[a]ny person who shall disturb the peace of the Council, make impertinent or slanderous remarks or conduct himself in a boisterous manner while addressing the Council shall be forthwith barred by the presiding officer from further audience before the Council, except that if the speaker shall submit to proper order under these rules, permission for him to continue may be granted by a majority vote of the Council."

> make, and I am saddened by it, because I believe in free speech and I believe in representation.

She then raised a copy of the offending pamphlet and continued her quasi-prosecutorial attack in a more aggressive tone:

> But when you have Council people who allow this type of propaganda to go out with their name on it to lure City residents up into Council meetings, it's a disgrace also. I own a home in this City, and for over the last four years, taxes have not gone up no more than three percent, if any, in any of those given years. Twenty-five dollars here, maybe seventy or fifty dollars here, nothing more. We all hate to raise taxes, but it's something you have to do if you are an elected municipal official. Taxes is just a part of the nasty job. Taxes is a nasty word, but we must realize, it's a reality in the United States of America. And again, I apologize to every resident in the City of Elizabeth who witnesses this tonight or tomorrow or whenever you see this on TV. We are trying to conduct the City business. . . . Our chief role as Council representatives is to allocate funds to run the City, to investigate, and to appropriate. And if we cannot do that in a decent, orderly manner and respect one another's positions, then we're just all for waste.
>
> Again, my colleagues, I apologize to you, but he left me with no decision but to have him to be

> removed. Constantly interrupting throughout the entire meeting, constant warnings. I have a two-and-a-half year old, and I was talking to him like my child, stop, stop. You're going to get it, stop. You're going to be thrown out of here, stop. There comes a point in time when you must act, and again, I apologize to all those who witnessed this, you in the audience, I apologize but he left me no other choice. I cannot allow my colleagues to overrun the meetings just to make a point.
>
> And I was so upset when I saw this [pamphlet] out in the pews to get people to come up to the meeting, 600, 800 dollars. That is not how you get people to be informed. This is scare tactics. His name is on it, he allowed it.

As a result of his removal from the meeting, Monteiro was deprived of his opportunity to vote on the budget. He was also charged with disruption of a public meeting in violation of New Jersey law, but subsequently found not guilty of the offense in municipal court.[3]

Monteiro filed a civil suit against the City of Elizabeth, the police officers who removed him from the City Council

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3. The offense of "disrupting meetings and processions" is defined as follows:

> A person commits a disorderly persons offense if, with purpose to prevent or disrupt a lawful meeting, procession or gathering, he does an act tending to obstruct or interfere with it physically.

N.J. STAT. ANN. § 2C:33-8.

Meeting, and Perkins-Auguste in her capacity as President of the City Council. He asserted various state law claims and claims under 42 U.S.C. § 1983 for violations of his First Amendment, Fourth Amendment, and due process rights. Monteiro's claims against the City and the police officers were disposed of by voluntary dismissal and on summary judgment, as were most of his claims against Perkins-Auguste. The District Court denied Perkins-Auguste's motion for summary judgment on Monteiro's claim under § 1983 for violation of his First Amendment rights.

Perkins-Auguste argued in her motion for summary judgment that she was entitled to qualified immunity on Monteiro's First Amendment claim. The District Court disagreed, however, finding that whether she was entitled to qualified immunity depended on the disputed question of her motivation for ejecting Monteiro from the meeting. The District Court held that the First Amendment protected Monteiro's right to speak on public issues at a public meeting and from adverse actions taken by officials presiding over the meetings. The District Court found that the council meeting was a limited public forum, subject to reasonable time, place, manner restrictions on speech. The District Court noted that in order to satisfy the First Amendment, time, place, manner restrictions must be viewpoint-neutral, narrowly tailored to serve a significant governmental interest, and must leave open ample alternative channels for communication.

The District Court found that provisions of the City of Elizabeth's Rules of Procedure forbade Council members from delaying or interrupting proceedings and allowed the

presiding officer to bar unruly members "except that if the speaker shall submit to proper order under these rules, permission for him to continue may be granted by a majority vote of the Council." The District Court held that these provisions were facially valid time, place, manner restrictions because they were viewpoint-neutral, narrowly tailored to serve the significant governmental interest in conducting orderly and efficient meetings of a public bodies, and left open ample alternative channels of communication. But the District Court concluded that the factual record raised a disputed question of fact whether Monteiro was silenced by Perkins-Auguste based on his views on the budget or her need to maintain order:

> [A] fact finder hearing the history between the parties, the words that were actually said at the meeting, and viewing Plaintiff's conduct as shown in the videotape, could reasonably conclude that the Plaintiff was not being disruptive and that Ms. Perkins-Auguste's actions were motivated by her antipathy to Plaintiff's particular outspoken views on the budget and his alleged sponsorship of the "offensive" flier that attacked the city's budgetary proposals. Indeed, prior to the event, Defendant was aware of Plaintiff's view and knew that he was going to vote and argue against the budget. Therefore, material questions of fact exist as to whether Defendant's motive for acting against Monteiro resulted from the content of his speech (constitutionally impermissible) or was an appropriately-limited time, place and manner restriction (constitutionally permissible). A rational

> jury could infer that Defendant Perkins-Auguste singled Plaintiff out because of the content of his speech, or that she was merely trying to maintain order for the efficient administration of her legislative responsibilities.

Monteiro v. City of Elizabeth, No. 01-1844, at 22-23 (D.N.J. Nov. 12, 2003). The District Court further concluded that the availability of qualified immunity depended on this disputed issue of fact:

> If Ms. Perkins-Auguste's motivation in removing Mr. Monteiro was her animosity towards him and the desire to stifle his view on the budget, then Ms. Perkins-Auguste as a reasonable public official would have known that her specific conduct violated the Plaintiff's clearly established rights and was not subject to qualified immunity. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In as much as these questions must be resolved by a trier of fact and determined perhaps through the use of a specifically-tailored jury verdict questionnaire, it would be improper to determine this matter via summary judgment.

Id. Accordingly, the District Court concluded that the question of Perkins-Auguste's motivation in ejecting Monteiro from the meeting was a disputed issue of material fact for the jury to decide, precluding summary judgment on Monteiro's First Amendment claim against Perkins-Auguste.

Appendix A

III.

We review a denial of judgment as a matter of law *de novo*, viewing the evidence in the light most favorable to the prevailing party. *Caver v. City of Trenton*, 420 F.3d 243, 262 (3d Cir. 2005). Judgment as a matter of law is only appropriate if "there is no legally sufficient evidentiary basis for a reasonable jury to find for [the moving] party on that issue." Fed. R. Civ. P. 50(a)(1).

The doctrine of qualified immunity protects government officials from civil damage suits for official conduct that does not violate clearly established law of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity " 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986)).

It is clearly established that when a public official excludes a elected representative or a citizen from a public meeting, she must conform her conduct to the requirements of the First Amendment. *See, e.g., Eichenlaub v. Twp. of Ind.*, 385 F.3d 274, 281 (3d Cir. 2004) (applying public forum analysis to township official's curtailing of allegedly disruptive speech at a public meeting); *Collinson v. Gott*, 895 F.2d 994, 995, 999 (4th Cir. 1990) (removal of citizen from public meeting of county commissioners for interruptions and truculence); *Jones v. Heyman*, 888 F.2d 1328, 1329 (11th Cir. 1989) (mayor's silencing and removal of citizen from public meeting for disruptive behavior);

Musso v. Hourigan, 836 F.2d 736, 739 (2d Cir. 1988) (school board's removal of citizen from public meeting for disruptive behavior). It is also clearly established that content-based restrictions on speech in a public forum are subject to strict scrutiny, while viewpoint-based restrictions violate the First Amendment regardless of whether they also serve some valid time, place, manner interest. *See, e.g., Good News v. Milford Cent. Sch.*, 533 U.S. 98, 106-107 (2001); *Rosenberger v. Rector & Visitors of Univ. Of Va.*, 515 U.S. 819, 829 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-393 (1993).

Thus, if Perkins-Auguste acted with an intent to suppress Monteiro's speech on the basis of viewpoint, she violated clearly established law and is not entitled to qualified immunity. In cases in which a constitutional violation depends on evidence of a specific intent, "it can never be objectively reasonable for a government official to act with the intent that is prohibited by law." *Locurto v. Safir*, 264 F.3d 154, 169 (2d Cir. 2001). Accordingly, the District Court did not err in holding that whether Perkins-Auguste's conduct violated clearly established law depended upon her motivation for ejecting Monteiro from the meeting. Furthermore, it was not error to submit this question to the jury because there was sufficient evidence from which a reasonable jury could conclude that Perkins-Auguste acted with a motive to suppress Monteiro's viewpoint.

Although qualified immunity is a question of law determined by the Court, when qualified immunity depends on disputed issues of fact, those issues must be determined by the jury. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995)

(qualified immunity may turn on disputed issues of fact); *Karnes v. Skrutski*, 62 F.3d 485, 491 (3d Cir. 1995) ("While the qualified immunity defense is frequently determined by courts as a matter of law, a jury should decide disputed factual issues relevant to that determination."). Motive is a question of fact that must be decided by the jury, which has the opportunity to hear the explanations of both parties in the courtroom and observe their demeanor. *See Mitchell v. Forsyth*, 472 U.S. 511, 529 (1985) (improper intent is a pure question of fact); *Walker v. Horn*, 286 F.3d 705, 710 (3d Cir. 2002).

Monteiro adduced sufficient evidence at trial from which a reasonable jury could conclude that Perkins-Auguste acted with a motive to suppress Monteiro's speech based upon his opposition to the budget. The jury saw the videotape of the meeting and heard the stridency of Perkins-Auguste's *ad hominem* attack on Monteiro. While Monteiro was arguably disrupting the proceedings by interrupting her, he was also defending himself from a personal attack.[4] It was Perkins-Auguste who changed the tone of the meeting from a debate about the merits of the budget to a quasi-prosecutorial forum.

Monteiro reminded Perkins-Auguste that his constitutional rights were at stake, stating: "I am not leaving Madam President. It's a violation of my civil rights. It's a violation of my First Amendment rights." Perkins-Auguste demonstrated her own awareness when she apologized to the audience for ejecting

4. Recall the words of Iago in *Othello*: "Who steals my purse steals trash. . . . But he that filches from me my good name/Robs me of that which not enriches him, / And makes me poor indeed." William Shakespeare, *Othello* (3.3.1807-1811).

him: "I am saddened by [the ejection], because I believe in free speech and I believe in representation." She admitted at trial to having knowledge of a law memorandum of the City of Elizabeth Legal Department setting forth a procedure for ejecting unruly members. *See supra* note 2. The speed with which she determined to eject Monteiro from the meeting, her failure to consult her fellow council members or to negotiate any compromise, and her failure to follow any established procedure could be viewed by a reasonable jury as evidence that Perkins-Auguste's behavior was emotionally charged and motivated by anger and personal animosity, rather than a desire to maintain smooth operation of the meeting. Despite the calm in the meeting room after the recess, Perkins-Auguste persisted in having Monteiro removed, in handcuffs, against his will.

Perkins-Auguste's argument that she could have conceivably (and constitutionally) ejected Monteiro on the basis of his disruptions is unavailing in the face of a jury verdict concluding that she acted with a motive to suppress Monteiro's speech on the basis of viewpoint. Qualified immunity does not require a plaintiff to demonstrate that the official's conduct was not reasonable under any conceivable set of circumstances. *See Crawford-El v. Britton*, 523 U.S. 574, 593-594 (1998) ("[T]he policy concerns underlying *Harlow* do not support Justice Scalia's unprecedented proposal to immunize all officials whose conduct is 'objectively valid,' regardless of improper intent."); *see also Locurto*, 264 F.3d at 169-170. When a constitutional violation depends on evidence of improper intent, it is sufficient for the plaintiff to "identify affirmative evidence from which a jury could find . . . the pertinent motive," in order to survive

summary judgment on that issue. *Crawford-El*, 523 U.S. at 600. After the jury returns a verdict, judgment as a matter of law will be granted to the defendant only if that verdict is not based on sufficient evidence. Fed. R. Civ. P. 50(a)(1).

In conclusion, the District Court did not err in denying Perkins-Auguste's motion for judgment as a matter of law. In its opinion denying the motion, the District Court noted that the jury found that the Defendant had an unconstitutional motivation for ejecting Plaintiff from the City Council meeting, thereby violating Plaintiff's rights under the First Amendment. Upon reviewing the evidence in the light most favorable to the Plaintiff, the District Court found that sufficient evidence existed to support the jury verdict. We see no error by the District Court.

IV.

Perkins-Auguste also complains that the District Court committed substantial error in admitting evidence of Monteiro's acquittal in municipal court of the disorderly persons charge and a memorandum of law from the City Law Department pertaining to the procedure to be followed in ejecting an unruly member of City Council. We review evidentiary rulings for abuse of discretion. *Abrams v. Lightolier*, 50 F.3d 1204, 1213 (3d Cir. 1995). The District Court rejected these objections when it denied Perkins-Auguste's motion for a new trial. The District Court admitted the evidence of Monteiro's acquittal in the municipal court as evidence of damages because the bulk of Monteiro's $10,000 damage award was a $5,000 claim for attorney's fees he incurred defending himself. The District Court

provided a special comprehensive instruction balancing the interests of both parties. The import of the acquittal, the court noted, was narrowly confined by the instruction. As for the memorandum of the City's attorney's, the District Court wrote:

> The memo set forth a legal opinion which provided specific instructions on the proper course of action in case a Council member became unruly. Perkins- Auguste admitted to having knowledge of the existence of this memo prior to the Council meeting in dispute and admitted that she did not heed that advice in that memorandum.

Monteiro v. City of Elizabeth, No. 01-1844, at 10 (D.N.J. Sept. 1, 2004). The court concluded that the memorandum provided highly probative circumstantial evidence that the ejection of the Plaintiff was not based solely on his alleged disruption "but was motivated by the content of his speech." We agree and hold that the District Court did not abuse its discretion in admitting these two items of evidence. *Abrams*, 50 F.3d at 1213 (3d Cir. 1995).

The District Court also rejected Perkins-Auguste's claim that it erred in submitting the question of punitive damages to the jury. We see no error with respect to the $750 punitive damages award. "Whether there is sufficient evidence to support punitive damages is a question of law which we review de novo." *Alexander v. Riga*, 208 F.3d 419, 430 (3d Cir. 2000). The evidence outlined above amply supports the jury's conclusion that Perkins-Auguste acted recklessly and with callous indifference to Plaintiff's rights in having

him removed from the meeting. Therefore, the punitive damages award will not be vacated.

V.

For the foregoing reasons, the judgment of the District Court is affirmed. Costs taxed against appellant.

FISHER, *Circuit Judge*, dissenting.

The majority characterizes the jury's finding of improper intent as the dispositive inquiry in assessing both the existence of a constitutional violation and entitlement to qualified immunity. This reflects, in my view, a fundamental misunderstanding of the relationship of motive to the First Amendment and the doctrine of qualified immunity. I respectfully dissent.

I.

Borne of judicial concerns over the deleterious effect of litigation on the work of public officials, qualified immunity protects those who overstep constitutional boundaries but nevertheless act in objective good faith. *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). An official may not be held statutorily liable for a constitutional violation unless a reasonable person in the same position, with the same facts, would have understood that he or she was infringing on the individual's civil rights. *Id.*

Inherent in this standard are two separate inquiries. The court must first determine, as a factual matter, whether

the record demonstrates a constitutional infringement. Disputed issues of historical fact, if relevant to the substantive elements of the alleged deprivation, must be submitted to the jury for resolution. *E.g.*, *Curley v. Klem*, 298 F.3d 271, 278 (3d Cir. 2002). Only if a violation is established must the court determine, as a legal matter, whether a reasonable person would have recognized that violation. Resolution of this question depends upon the court's application of the facts of the case to "clearly established" law. *E.g.*, *Harvey v. Plains Twp. Police Dep't*, 421 F.3d 185, 194 n. 12 (3d Cir. 2005).

A.

The leader of a legislative meeting, like a public employer or owner of a limited public forum, is constitutionally entitled to impose limitations on the expressive rights of participants in order to facilitate the legitimate goals of the gathering. *Parker v. Merlino*, 646 F.2d 848, 854 (3d Cir. 1981); *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-30 (1995); *Brennan v. Norton*, 350 F.3d 399, 412-13 (3d Cir. 2003). Speech may be limited on the basis of time, place, and manner— and even content; however, it may not be restricted on the basis of viewpoint. *Parker*, 646 F.2d at 853-54; *see also Rosenberger*, 515 U.S. at 828-30; *Brennan*, 350 F.3d at 412-13. So long as legislators comply with procedural rules and speak on topics within the scope of the meeting, they enjoy an absolute right to express their views without restraint and without fear of subsequent retaliation. A leader who prevents a member from speaking or punishes a member for prior speech based on his or her viewpoint has infringed on the member's First Amendment rights. *Parker*, 646 F.2d at 853-54; *see also Bond v. Floyd*,

385 U.S. 116, 135-37 (1966); *Velez v. Levy*, 401 F.3d 75, 97-98 (2d Cir. 2005); *DeGrassi v. City of Glendora*, 207 F.3d 636, 645-46 (9th Cir. 2000); *Miller v. Town of Hull*, 878 F.2d 523, 532-33 (1st Cir. 1989).

But, even if retaliatory motive is established, the leader may yet escape liability by demonstrating that there is no causation between the improper intent and the restrictions on the legislator's speech: i.e., that the legislator would have suffered the same restrictions in the absence of improper intent. *Crawford-El v. Britton*, 523 U.S. 574, 593 (1998) ("[P]roof of an improper motive is not sufficient to establish a constitutional violation—there must also be evidence of causation."). Proof that the same actions would have been taken regardless of the official's intent cleaves the strand of causation between the constitutional violation and the harm, precluding success on the claim. *See, e.g., Texas v. Lesage*, 528 U.S. 18, 20-21 (1999). No one would argue, for example, that an individual excluded from a public forum would have a basis for recovery if the decision to deny access was compelled by two independently operating regulations, one of which was viewpoint-biased and one of which was viewpoint-neutral. A restriction imposed as a result of improper intent will not give rise to liability if the same restriction would have been imposed otherwise. *Mihos v. Swift*, 358 F.3d 91, 105 (1st Cir. 2004) ("[A] defendant might preva . . . in a case alleging an intent-based constitutional tort, without need to inquire as to her motives, if . . . the defendant showed that she would have reached the same decision even in the absence of the employee's protected speech.") (citing *Crawford-El*, 523 U.S. at 592-93).

The opinion of the majority does not address, and presumably rejects, this premise, which has been recognized in a series of Supreme Court decisions, including *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), and *Crawford-El v. Britton*, 523 U.S. 574 (1998). It assumes instead that the jury's finding of unconstitutional motive demonstrates, beyond cavil, the existence of a constitutional violation. It does not discuss whether, based on his repeated disruptions and noncompliance with procedural rules of the Council, Monteiro would have been ejected from the meeting even if Perkins-Auguste had not harbored an intent to punish him for his views.

Perhaps the majority's reluctance to confront the issue stems from the District Court's failure to instruct the jury on this point. Despite evidence that Perkins-Auguste would have expelled Monteiro from the meeting regardless of his previously expressed opinions, the jury was not instructed on this aspect of causation analysis and never made a finding on the subject. Perkins-Auguste did not object to this omission during trial, and has not raised it on appeal, and we are thus constrained to assume that the jury was properly charged. *See Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) (noting that issues not raised on appeal are abandoned). Nevertheless, because causation constitutes an essential aspect of Monteiro's claim, and because Perkins-Auguste argues the matter in her briefs, we must consider whether a finding of causation would have been supported by the evidence.

The issue presents a close question. Monteiro spoke out of turn during the meeting and repeatedly interjected

comments during Perkins-Auguste's speech.[5] He did not comply with her rulings and refused to allow Perkins-Auguste to conclude her remarks uninterrupted. These circumstances suggest that Perkins-Auguste, or indeed any legislative leader, would have taken the same actions regardless of an intent to retaliate against Monteiro.

However, because the burden of proof on this issue lies with Perkins-Auguste, *see Mt. Healthy*, 429 U.S. at 287, and the record does not compel a finding in her favor, I will assume that the jury could have reasonably found—if given the opportunity—that the same actions would not have been taken in the absence of improper intent. This conclusion, considered with the findings that Monteiro engaged in protected speech and that Perkins-Auguste acted with retaliatory intent in suppressing his speech, demonstrates that a constitutional violation occurred.

B.

The second stage of the qualified immunity analysis is whether, given the existence of a constitutional violation, a reasonable person should have recognized it under "clearly established" law. The hypothetical "reasonable person" is an objective observer, who is aware of the facts known to the official but possesses an independent knowledge of governing

5. I will not quibble with the majority opinion's recitation of facts except to note that some of its characterizations of the record—particularly the charges that Perkins-Auguste "immediately leveled a pointed attack at Monteiro" and "changed the tone of the meeting from a debate about the merits of the budget to a quasi-prosecutorial forum," — are less historical than hyperbolical.

legal precepts. *See Harlow*, 457 U.S. at 806. Only when these rules clearly forbid the actions taken by the official will immunity be denied. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

1.

Subjective intent plays a limited role in this analysis. It is considered as an element of the underlying claim when the right at issue is predicated on the official's motive, but the presence of improper motive does not preclude qualified immunity. *Grant v. City of Pittsburgh*, 98 F.3d 116, 124 (3d Cir. 1996). An official who has committed a constitutional violation, even one evincing improper intent, will nevertheless be immune from liability if an objective observer in the same position, given the same facts and knowing of the official's improper motive, would not have recognized a constitutional violation under clearly established law. *Mihos*, 358 F.3d at 105 ("[A] defendant might prevail . . . in a case alleging an intent-based constitutional tort, without need to inquire as to her motives, if . . . the relevant law was not clearly established. . . .") (citing *Crawford-El*, 523 U.S. at 592-93).

The opinion of the majority holds to the contrary. It concludes that proof of a motive-based constitutional tort is itself sufficient to bar immunity, regardless of the clarity (or obscurity) of the violation under existing law. This position is summarized in a quote from the Court of Appeals for the Second Circuit, on which the majority relies: "[W]here . . . specific intent is actually an element of the plaintiff's claim as defined by clearly established law, it can never be

objectively reasonable for a government official to act with the intent that is prohibited by law." *Locurto v. Safir*, 264 F.3d 154, 169 (2d Cir. 2001).

The flaw in this approach has been recognized by the Supreme Court: "[Proof of] unconstitutional motive [will not] automatically carry[ ] a plaintiff to trial . . . [if there is] doubt as to the illegality of the defendant's particular conduct. . . ." *Crawford-El*, 523 U.S. at 592- 93. An official may possess an unconstitutional motivation and yet be reasonably unaware of a constitutional violation. For example, an official who engages in a series of retaliatory maneuvers designed to punish an individual for prior speech may violate the individual's civil rights—and indeed has acted with unconstitutional and malicious intent in doing so—but may not recognize the violation because governing law did not adequately explain that such maneuvers were so serious as to infringe on the individual's rights. *McKee v. Hart*, 2006 WL 27474, at *5-7 (3d Cir. Jan.6, 2006).

Subjective intent may be considered in the immunity analysis when it forms an element of the constitutional violation, but, even in these cases, it must not be given dispositive weight. *Crawford-El*, 523 U.S. at 592-93. The court must still determine whether a reasonable person in the same position would have recognized the infringement under "clearly established" law. *Id.*

2.

An infringement should be recognized by a reasonable person when it is fairly compelled by the facts of the case in light of relevant governing law. *See Anderson*, 483 U.S.

at 640. Existing jurisprudence must offer an adequate explanation of the right at issue and its application in circumstances similar to those faced by the official, such that an objective observer could conclude, without substantial equivocation, that a constitutional deprivation has occurred. In other words, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*

The opinion of the majority defines the right at issue in this case too broadly. It states that a public official in Perkins-Auguste's position "must conform her conduct to the requirements of the First Amendment" and that "viewpoint-based restrictions violate the First Amendment." These platitudes bear no relationship to the particular circumstances of this case and do little to define the standard governing Perkins-Auguste's conduct. *Anderson*, 483 U.S. at 640 (cautioning against defining the applicable legal rules at too high a "level of generality," without consideration of the "particularized" circumstances of the case). The majority cites to no cases discussing whether and when a member of a legislative body may be removed from a public meeting.

This failure is understandable, given the dearth of precedent on the issue. Only one opinion of the Supreme Court has involved a claim of unconstitutional retaliation in the legislative context, *see Bond*, 385 U.S. at 135-37, and that case was resolved on other grounds, *see id.* at 137 & n. 14. Our own discussions on the subject have been cursory, *see Larsen v. Senate of Pa.*, 154 F.3d 82, 94-95 (3d Cir. 1998), and have not provided a clear archetype for analysis, *see id.*; *see also Parker*, 646 F.2d at 853-54. Opinions from other

courts have offered similarly limited explanations of the circumstances under which a legislative leader may be held liable for expelling a member, without addressing *Mt. Healthy* or issues of causation. *See, e.g., Velez*, 401 F.3d at 97-98; *Degrassi*, 207 F.3d at 645-46; *Miller*, 878 F.2d at 532-33.

The lack of guidance is attested further by the District Court's and the majority's misunderstanding of the nature of the right to free expression. Neither the opinions of the District Court nor that of the majority acknowledges that an official may defeat a prima facie claim of a First Amendment violation by proving that the same actions would have been taken absent the improper motive. This principle, clearly established by *Mt. Healthy* and *Crawford-El*, eluded the District Court and continues to elude my colleagues. A lay person could hardly be expected to understand the contours of this right when the matter has so confounded the federal judiciary.

Only one standard is plainly distillable from prior decisions, such that a reasonable person should have recognized it: a legislator may be disciplined or suspended from a public meeting if the action is reasonably consonant with the legitimate goals of the forum. *See, e.g., Bond*, 385 U.S. at 135-36; *Parker*, 646 F.2d at 853-55; *see also Mt. Healthy*, 429 U.S. at 287. This principle is not bound to a nuanced understanding of the doctrinal basis of a First Amendment claim or application of *Mt. Healthy*. It is based, instead, on the common sense notion that the Constitution does not prohibit expulsion of an unruly member whose obstreperous conduct prevents fulfillment of legislative duties.

3.

I cannot conclude, on this backdrop, that a reasonable official in Perkins-Auguste's position should have realized that her conduct exceeded constitutional bounds. There is no doubt that Monteiro was being disruptive during the meeting and failed to comply with Perkins-Auguste's rulings. He had interrupted other members of the Council prior to Perkins-Auguste's speech and had been warned against such conduct. When Perkins-Auguste started speaking, Monteiro immediately interrupted once again. She ruled him out of order and threatened to remove him from the meeting. He nevertheless continued to speak. She asked the officers to remove him—not to arrest him—and yet he persisted. She agreed to his arrest only after it became evident that he would not leave voluntarily.

Monteiro's repeated disruptions rendered continuation of the meeting difficult, if not impossible. He prevented other members from concluding their remarks and effectively blocked a final vote on the budget proposal. His conduct was, in short, antithetical to the legitimate goals of the forum. A reasonable official in the same position as Perkins-Auguste could have concluded, under existing caselaw, that the decision to remove Monteiro was constitutionally justified, regardless of her actual underlying intent. *See, e.g., Bond*, 385 U.S. at 135-36; *Parker*, 646 F.2d at 853-54; *see also Mt. Healthy*, 429 U.S. at 287. She is thus entitled to qualified immunity. *See Anderson*, 483 U.S. at 638-40.

This conclusion does not cast doubt on the jury's verdict, or its findings that Perkins-Auguste was motivated by a desire

to retaliate against Monteiro and that a constitutional violation did occur. That an official is granted qualified immunity does not mean that he or she acted laudably or even constitutionally. To the contrary, an official may act in a morally and legally culpable fashion and yet be entitled to immunity if an objective observer, in the same position, would not have recognized a constitutional infringement. *Crawford-El*, 523 U.S. at 592-93; *Mihos*, 358 F.3d at 105; *see McKee*, 2006 WL 27474, at *5-7. This legal determination does not vitiate or excuse the constitutional violation. It simply acknowledges that an official will not be held statutorily liable, under 42 U.S.C. § 1983, for a constitutional infringement of which a reasonable person would not have been aware.[6] *See, e.g., Crawford-El*, 523 U.S. at 592-93; *Harlow*, 457 U.S. at 818-19.

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6. The majority also suggests that Perkins-Auguste forfeited the defense of qualified immunity by failing to file an interlocutory appeal from the District Court's denial of qualified immunity on summary judgment. ("After the jury returns a verdict, judgment as a matter of law will be granted to the defendant only if that verdict is not based on sufficient evidence."). This proposition is somewhat novel, and does not find support in decisions from our circuit or others. *See Chan v. Wodnicki*, 67 F.3d 137, 139 (7th Cir. 1995) ("The trial has not made [the] claim of immunity moot, for while the immunity is from trial as well as from judgment, by the same token it is from judgment as well as from trial."); *Matherne v. Wilson*, 851 F.2d 752, 756-59 (5th Cir. 1988) ("There may be good reasons why a defendant may elect to not appeal [from the denial of qualified immunity] before trial, and we see little value in a rule of waiver that would force unwanted appeals, many of which undoubtedly never would have been necessary."); *see also Wilson v. City of Boston*, 421 F.3d 45, 53-54 (1st Cir. 2005); *Sharrar v. Felsing*, 128 F.3d 810,

(Cont'd)

Appendix A

II.

The mantle of qualified immunity will be denied to a public official only when a reasonable person in the same situation would have recognized a constitutional infringement. Perkins-Auguste's conduct, even if violative of Monteiro's civil rights, was not so patently unconstitutional under existing caselaw as to deny her immunity.

The majority concludes to the contrary. It does so based on a fundamental misinterpretation of the relationship of subjective intent to the First Amendment and the doctrine of qualified immunity. This error will, I fear, have unfortunate ramifications for our jurisprudence in these fields. I respectfully dissent.

(Cont'd)

830-31 (3d Cir. 1997). At the very least, it is an open question, and one that need not be resolved in this case, as the parties apparently agree that the issue of qualified immunity has not been waived.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED SEPTEMBER 1, 2004 DENYING PERKINS-AUGUSTE'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR IN THE ALTERNATIVE FOR A NEW TRIAL

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.: 01-1844 (JLL)

ARMENIO T. MONTEIRO,

Plaintiff,

v.

CITY OF ELIZABETH, *et al.*,

Defendants.

OPINION & ORDER

LINARES, District Judge.

This matter comes before the Court on motions of both parties: Defendant Patricia Perkins-Auguste moves for judgment as a matter of law pursuant to Fed.R.Civ.P. 50 and in the alternative, for a new trial pursuant to Fed.R.Civ.P. 59. Plaintiff Armenio Monteiro moves for an award of attorney fees pursuant to 42 U.S.C. § 1988. For the reasons stated herein, the Court grants Plaintiff's motion and denies Defendant's motions.

Appendix B

I. *Procedural History*

Plaintiff had originally asserted various federal and state claims arising out of actions that took place at a City Council meeting in Elizabeth, New Jersey on April 10, 2001. Plaintiff, a City Council member, alleged that he was silenced at the meeting and then arrested because of his opposition to the city budget. At oral argument held on October 20, 2003, Plaintiff voluntarily dismissed all state law claims and proceeded only on his federal claims under the First Amendment, due process clause, and right to privacy. On November 12, 2003, this Court granted summary judgment to Defendant City of Elizabeth and the individual Defendants Cox and Meola. This Court also granted summary judgment to Defendant Patricia Perkins-Auguste, the Council President, on Plaintiff's privacy and due process claims but denied summary judgment to her on Plaintiff's First Amendment claim.

With respect to the outstanding First Amendment claim, the Court found that material issues of fact existed as to whether Defendant Perkins-Auguste silenced Plaintiff based on the content of his speech or based on the need to maintain order at the Council meeting. The Court noted that if a trier of fact were to find that Perkins-Auguste was motivated by the desire to stifle Plaintiff's views, she would not be entitled to qualified immunity as a "reasonable public official would have known that her specific conduct violated the Plaintiff's clearly established rights." (Opinion & Order, 23). A jury trial commenced on March 16, 2004 to resolve the remaining First Amendment claim. On March 22, 2004, the jury entered a verdict, finding that Defendant's removal of Plaintiff from

the City Council meeting was unconstitutionally motivated and violated Plaintiff's rights under the First Amendment. The jury awarded compensatory damages in the amount of $10,000 and punitive damages in the amount of $750. Upon adding pre-judgment interest to this figure, the Court entered judgment for $11,866. The present motions were filed thereafter.

II. *Defendant's Motion for Judgment as a Matter of Law*

Pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, the court may grant a renewed motion for judgment as a matter of law if there is "no legally sufficient evidentiary basis" for a reasonable jury to have found for the prevailing party. Such a motion will be granted only where, "viewing the evidence in the light most favorable to the non-movant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." *Buskirk v. Apollo Metals*, 307 F.3d 160, 166 (3d Cir. 2002) (quoting *Lightning Lube, Inc. v. Witco* Corp., 4 F.3d 1153, 1166 (3d Cir.1993)). When presented with a motion for judgment as a matter of law following a jury verdict, a "district court must view the evidence in the light most favorable to the non-moving party, and determine whether the record contains the 'minimum quantum of evidence from which a jury might reasonably afford relief.' " *Mosley v. Wilson*, 102 F.3d 85, 89 (3d Cir. 1996) (quoting *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 691 (3d Cir. 1993)); *see also Murray v. United of Omaha Life Ins. Co.*, 145 F.3d 143, 148 n. 4 (3d Cir. 1998); *Coleman v. Kaye*, 87 F.3d 1491, 1497 (3d Cir. 1996).

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Upon viewing the evidence in the light most favorable to Plaintiff, the Court finds that sufficient evidence exists to support the jury verdict. Defendant argues that the absence of prior incidents between Perkins-Auguste and Monteiro, coupled with their similar voting records, makes a finding of improper motivation impossible. However, Monteiro testified that there were several major legislative issues on which he publicly disagreed with Perkins-Auguste, including the budgetary issue that is central to the present dispute. As Monteiro stated at trial, his similar voting record with Perkins-Auguste can be explained by the fact that the great majority of votes by the Council were taken on routine administrative matters of little controversy. The voting differences between the two, although small in number, appear to have been rather large in terms of their legislative importance. In any event, although the prior relationship between Perkins-Auguste and Monteiro could shed light on the motivation for Perkins-Auguste's actions on April 10, 2001, it is by no means diapositive. It is certainly possible that any ill-will held against Monteiro was of recent vintage and had not been expressed prior to the disputed Council meeting. Moreover, the comments made by Perkins-Auguste, accusing Monteiro of "deception" and placing "propaganda throughout the community" with respect to the budget, certainly lends support to the possibility that her actions were motivated by factors beyond the events of April 10.

Defendant also argues that a First Amendment violation is precluded because Plaintiff spoke "virtually uninterrupted" for over twenty minutes on his opposition to the budget. (Def. Br., 2). However, due to his arrest, he was in fact prevented from expressing any further opinions or further

participating in the meeting. In addition, he was unable to vote for the city budget and fulfill his responsibilities as an elected official. The fact that his vote would not have changed the outcome of the legislation is of no moment. The legality of the suppression of speech does not turn on its ultimate practical effect — were that to be the case, any minority viewpoint could be quashed without repercussion.

The record, as is the case in virtually every trial, contains evidence which a jury could interpret as favorable to Defendant's position. However, it is the very existence of this conflicting evidence that led the Court to deny summary judgment in the first place and which required a determination by a fact finder. At trial, Defendant Perkins-Auguste admitted that she did not follow the legal advice given to her in the September 26, 2000 memo for situations like the one at issue. (Tr. 3.138). She conceded that Monteiro was not actively disruptive when she asked the police officers to escort him out of the room, but that "his very presence was making it a disruptive situation." (Tr. 3.142). After hearing testimony from the various participants and weighing their credibility, and upon viewing the videotape of the Council meeting on several occasions throughout the course of the trial, it was certainly reasonable for a jury to conclude that Defendant acted out of unconstitutional motivation. The Court therefore sees no reason to substitute its judgment for that of the jury.

Defendant also suggests that the qualified immunity afforded to Perkins-Auguste should protect her from liability, as it is "certainly reasonable to believe that plaintiff was purposely disrupting the City Council meeting." (Def. Br.,

16). However, contrary to Defendant's assertions, the relevant question for immunity purposes is not whether it was reasonable for Defendant to believe that Plaintiff was purposely disrupting the meeting. Rather, the legal inquiry hinges on whether it was reasonable, based on the clearly existing case law, for a person in Defendant's position to suppress a person's speech in a designated public forum like the Council meeting based on the content of that person's speech. Clearly it was not. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). As this Court had already noted in its earlier summary judgment decision: "If Ms. Perkins-Auguste's motivation in removing Mr. Monteiro was her animosity towards him and the desire to stifle his views on the budget, then Ms. Perkins-Auguste as a reasonable public official would have known that her specific conduct violated the Plaintiff's clearly established rights and was not subject to qualified immunity. See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)." (Opinion & Order, 23). Because the jury in this case found that Defendant was in fact motivated by the desire to suppress Plaintiff's speech, a conclusion that was not improper or unjustified based on the evidence, no qualified immunity applies. Overall, because the jury verdict was founded on a "legally sufficient evidentiary basis," Defendant's motion for a judgment as a matter of law is denied.

III. *Motion for New Trial Pursuant to Fed.R.Civ.P. 59*

Defendant argues two grounds for a new trial: 1) that the verdict was clearly against the weight of the evidence; and 2) that substantial error occurred in the admission of

evidence. Pursuant to Rule 59(a) of the Federal Rules of Civil Procedure, "[a] new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . ." While Fed.R.Civ.P. 59 does not detail the grounds on which a new trial may be granted, the following have provided reasons for granting a new trial: "the verdict is against the clear weight of the evidence; damages are excessive; the trial was unfair; and that substantial errors were made in the admission or rejection of evidence or the giving or refusal of instructions." *Lightning Lube, Inc. v. Witco Corp.*, 802 F.Supp. 1180, 1186 (D.N.J. 1992), affd 4 F.3d 1153 (3d Cir.1993)

In considering a motion for new trial, the evidence must be viewed in the light most favorable to the party with the verdict. *Wagner v. Firestone Tire & Rubber Co.*, 890 F.2d 652, 656 (3d Cir. 1989). "To uphold the verdict, the district court need only determine that the record contains the minimum quantum of evidence from which a jury might reasonably afford relief." *Dawson v. Chrysler Corp.*, 630 F.2d 950, 959 (3d Cir. 1980). Where a motion for a new trial is based primarily on the weight of the evidence, the discretion of the trial court is limited. *Klein v. Hollings*, 992 F.2d 1285, 1290 (3d Cir. 1993); *see also Greenleaf v. Garlock. Inc.*, 174 F.3d 352, 366 (3d Cir.1999). Indeed, "new trials because the verdict is against the weight of the evidence are proper only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks [the] conscience." *Greenleaf*, 174 F.3d at 366 (quoting *Williamson v. Consol.*

Rail Corp., 926 F.2d 1344, 1353 (3d Cir. 1991)). In general, a trial court must take great care when exercising its discretion to award a new trial. *See Lightning Lube*, 802 F.Supp. at 1185; *Hulmes v. Honda Motor Co., Ltd.*, 960 F.Supp. 844, 850 (D.N.J. 1997). While a court is permitted to consider the credibility of witnesses and to weigh evidence, the court must "exercise restraint to avoid usurping the jury's primary function." *Hurley v. Atl. City Police Dept*, 933 F.Supp. 396, 403 (D.N.J. 1996)

Defendant's contention that the verdict was "against the weight of the evidence" can be quickly dismissed. In support of this claim, Defendant merely refers back to its earlier arguments for a judgment as a matter of law. The Court likewise echoes its earlier statements. For the same reasons as stated in the previous section, the Court finds that the jury verdict was not "against the weight of the evidence." Based on the evidence presented, the jury acted well within its discretion in finding that Plaintiffs speech was protected and that Defendant unconstitutionally violated his speech by her actions at the Council meeting. Defendant provides no reason for the Court to find that the verdict amounts to a "miscarriage of justice" or that it "shocks the conscience." *Greenleaf*, 174 F.3d at 366.

Defendant also contends that a new trial is necessary in light of certain evidentiary determinations made at trial. Under Fed.R.Civ.P. 61, "[n]o error in either the admission or the exclusion of evidence . . . is ground for granting a new trial or for setting aside a verdict . . . unless refusal to take such action appears to the court inconsistent with substantial justice. . . ." None of the evidentiary decisions

cited by Defendant was "inconsistent with substantial justice" so as to warrant a new trial.

Defendant posits that the Court erred in allowing Plaintiff to introduce evidence of his acquittal to the municipal court disorderly person's charge. Although not cited by Defendant, the Court is aware of the jurisprudence, including that of this Circuit, that cautions against the admission of prior judgments of acquittal. *See, e.g., United States v. Gricco*, 277 F.3d 339, 352 (3d Cir. 2002) ("[A] judgment of acquittal is not usually admissible to rebut inferences that may be drawn from the evidence that was admitted.") (quoting *United States v. Viserto*, 596 F.2d 531, 537 (2d Cir. 1979)). The problems with admitting a prior acquittal into evidence stem largely from fears that a jury would place undue emphasis on the acquittal, which does "not present a determination of innocence, but rather only a decision that the prosecution has not met its burden of proof beyond a reasonable doubt." *Gricco*, 277 F.3d at 353.

Having considered the reasons for the evidentiary exclusion of a prior acquittal and having weighed such reasons against the advantages to the admission of the acquittal in this case, the Court believes that the acquittal was properly admitted. The fact that Monteiro was charged and faced a trial on the disorderly persons charge was certainly probative on the issue of damages. As a result of delays in the scheduling of the municipal court trial, Monteiro was subject to the uncertainty of the criminal charges and the unknown outcome of the municipal trial for three years until his acquittal, and he claimed in the present case that the anxiety arising from these pending charges caused him

great pain and suffering. The acquittal was not offered to demonstrate that Monteiro was in fact non-disruptive at the Council meeting. At trial, the jury witnessed the circumstances leading up to Monteiro's arrest and listened to the testimony of the arresting police officers, including the charges brought against him. For the jury to be told only that Monteiro was charged with an offense but not to know the ultimate resolution of those charges would have unfairly invited speculation as to what eventually occurred and would have left the jury to speculate as to the ultimate outcome of the charges as well as potentially the issue of damages.

At trial, the jury was told that Monteiro was charged with a disorderly persons offense and the consequences arising from a conviction of such an offense. After hearing that he was ultimately found not guilty of this offense, the Court, in order to ensure that neither party was exposed to undue prejudice, gave a special instruction to the jury on the limited probative value of the acquittal. The Court specifically instructed the jury as follows:

> The fact that he was found not guilty at the municipal court trial does not in any way mean that that ought to govern your decision today or impact it in any way. . . . Number one, in order for Mr. Monteiro to have been convicted in municipal court, the Government or State would have had to prove the charges against him by a standard of beyond a reasonable doubt, which is a completely different standard than applies in a civil case like this. Number two, obviously that issue is different than what is involved here.

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> The issue here, as has been explained by both lawyers and by this Court, is whether or not his arrest and removal from the City Council meeting was motivated by Ms. Perkins, if she tried to stifle his constitutional rights or, on the other hand, to keep order in the meeting and as a proper exercise of her job as president, presiding Council president.

(Tr. 2.61-2.62)

The Court believes that accompanying the evidence of the acquittal with a special comprehensive jury instruction properly balanced the interests of both parties. The jury would not be able to draw any improper inferences as it might have done in a factual vacuum. At the same time, the import of the acquittal in this case was narrowly confined by the instruction in which the jury was told why the issues involved with the municipal court decision were distinct from those involved in the present suit. Additionally, the fact that the jury was able to view the videotape of the incident and thereby draw its own conclusions as to Defendant's motivation underlying her acts, further dissipates any prejudice that may have been caused by the admission of the acquittal. It is also noteworthy that the jury's damages award was certainly not excessive nor did it indicate in any way that the evidence of the acquittal unduly inflated the damages aspect of the case. For the aforementioned reasons, this evidentiary decision was consistent with substantial justice and Defendant's objection is rejected.

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Defendant also claims that the Court should not have admitted into evidence the September 26, 2000 memo setting forth the opinion of the city's attorneys that if a council member repeatedly refused to comply with orders of the president, his ejection required a vote of a majority of Council members. However, the probative value of this memorandum was not "substantially outweighed" by the danger of "unfair prejudice, confusion of the issues, or misleading the jury." Fed.R.Evid. 403. The memo set forth a legal opinion which provided specific instructions on the proper course of action in case a Council member became unruly. Perkins-Auguste admitted to having knowledge of the existence of this memo prior to the Council meeting in dispute and admitted that she did not heed the advice in that memo. Although her failure to heed this legal advice is by no means dispositive of the issue of her motivation, it certainly provides highly probative circumstantial evidence that her retaliatory actions were not premised solely on Monteiro's "disruption" but motivated by the content of his speech. Any fears that the jury would believe that the memo's instructions were binding on Perkins-Auguste should have been sufficiently dispelled by the curative instruction given to the jury. At trial, the jury was told that the legal memo was only an opinion from the Law Department to the City of Elizabeth Council: "It is not an ordinance. It is not a statute, but apparently it was sent to the City Council, and it is the opinion of the town lawyers about the particular issue in question." (Tr. 2.95). The Court believes that its decision with respect to this memorandum was proper and therefore rejects the evidentiary objection by Defendant.

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IV. *Punitive Damages*

Defendant also argues that the $750 punitive damages award should be vacated as a matter of law. However, the Court rejects this argument. The standard for awarding punitive damages under § 1983 has been summarized as follows: "a jury may . . . assess punitive damages . . . under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). In *Savarese v. Agriss*, 883 F.2d 1194 (3d Cir. 1989), the Third Circuit held that this standard is disjunctive and not conjunctive, and explained that "for a plaintiff in a section 1983 case to qualify for a punitive award, the defendant's conduct must be, at a minimum, reckless or callous. Punitive damages might also be allowed if the conduct is intentional or motivated by evil motive, but the defendant's action need not necessarily meet this higher standard." Id. at 1204. *See also Brennan v. Norton*, 350 F.3d 399, 428-29 (3d Cir. 2003).

Based on the record before it, it was not unreasonable for the jury to conclude that Perkins-Auguste acted recklessly and with callous indifference to the First Amendment rights of Monteiro. Perkins-Auguste had him removed from the Council room by police officers based on his continued "presence" at the meeting, thereby precluding any further participation in the meeting and preventing him from voting on the budget. The jury could have reasonably inferred from these actions that Perkins-Auguste could have taken alternative measures that would not have led to the suppression of Plaintiff's speech, including those actions laid

out in the September 26, 2000 memorandum. The Court will not set aside the punitive damages award or order a new trial on punitive damages.

V. *Motion for Attorney Fees and Costs*

David Corrigan, attorney for Plaintiff, requests attorney fees and costs as a "prevailing party" under 42 U.S.C. § 1988. In total, Plaintiff petitions for $61,019.83, which includes $58,400.00 in attorney's fees. Corrigan has submitted a certification that he spent 181.7 hours of work on this case at a rate of $250 per hour. He also claims that two other attorneys worked with him on the case, who worked a combined 86.5 hours at a rate of $150 per hour. Counsel states he has excluded 50.75 hours from this calculation because said hours pertained to unsuccessful claims in the litigation. Plaintiff also seeks costs in the amount of $2,619.83 for items such as deposition transcripts, exhibits, copying and courier services.

42 U.S.C. § 1988 provides that "in any action or proceeding to enforce a provision of § . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." When reviewing a petition for attorney fees under this statute, a district court is obligated to "review the time charged, decide whether the hours set out were reasonably expended for each of the particular purposes described and then exclude those that are excessive, redundant, or otherwise unnecessary." *Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir. 2001) (internal citation omitted). For work to be included in the calculation of reasonable attorneys' fees, the

work must be "'useful and of a type ordinarily necessary' to secure the final result obtained from the litigation." *Pennsylvania v. Del. Valley Citizens' Council*, 478 U.S. 546, 561 (1986); *Planned Parenthood v. Att'y General of N.J.*, 297 F.3d 253, 266 (3d Cir. 2002). In general, "it is well settled that a prevailing plaintiff should recover an award of attorney's fees absent special circumstances." *Truesdell v. Philadelphia Hous. Auth.*, 290 F.3d 159, 163 (3d Cir. 2002) (internal citations omitted).

Defendant's objection to the award of fees is a limited one. Defendant does not deny that Plaintiff is a "prevailing party" in this case by succeeding at trial on the First Amendment issue. *Hensley v. Eckerhart*, 461 U.S. 424, 439 (1983). Moreover, Defendant does not dispute the propriety of the hourly rate set forth by counsel for Plaintiff. Instead, Defendant contends that the fee claim must be reduced by 16.9 hours due to duplicative billing, time spent on claims no longer in the suit, and time spent on the application for the fee request itself.

Upon reviewing the application for attorneys fees submitted by Mr. Corrigan, the Court finds that Plaintiff's request for attorney fees is sound. There is no reason to believe that the entries for August 14th and August 15th 2002 cited by Plaintiff were in fact duplicative. Although both entries referred to the review and editing of interrogatory answers, in all likelihood, the task that was started on August 14th was simply continued on August 15th. Moreover, the hours spent in this regard were not overstated so as to suspect duplication. In addition, the time spent reviewing the files, preparing for and reviewing the depositions of Andrew R.

Cox and Richard Meola, a combined 10.2 hours on September 24-25, 2002 and March 19, 2003, was appropriate. Although Cox and Meola were no longer defendants in the case, as witnesses at trial, it remained necessary to take both of their depositions and to flesh out their involvement in the incident. Finally, the 5.2 hours spent working on this fee application in April 2004 are properly compensable under 42 U.S.C. § 1988. *See. e.g.*, *Planned Parenthood*, 297 F.3d at 268; *West Virginia Univ. Hosps., Inc. v. Casey*, 898 F.2d 357, 367 (3d Cir. 1990).

The Court does not believe that the fee award should be reduced based on the fact that Plaintiff was successful only in one of his original claims. The Court has the authority to subtract the hours spent litigating unsuccessful claims that were "distinct in all respects from claims on which the party did succeed." *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990). However, contrary to the reduction requested by Defendant, the United States Supreme Court has rejected "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon." *Dooley v. City of Philadelphia*, 2002 WL 31053375, at *6 (E.D.Pa. Aug 30, 2002) (citing *Hensley*, 461 U.S. at 435 n. 11). When various claims contain similar underlying facts, the proper focus of judicial inquiry should be the amount considered reasonable in relation to the results obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). In the case at bar, the costs and fees set forth in the application were a reasonably necessary expenditure in order to obtain Plaintiff's eventual success at trial on the First Amendment claim. All of the time spent on the claims dismissed on summary judgment have been excluded from the calculation, and none

of the hours enumerated was spent litigating "entirely distinct" claims. Consequently, the Court concludes that the hours billed by Plaintiffs counsel should not be reduced for any lack of success as the expenditures were reasonable in relationship to the ultimate results.

CONCLUSION

For the reasons stated herein, IT IS on this 1st day of September, 2004, hereby,

ORDERED that Defendant's motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50 and in the alternative, for a new trial pursuant to Fed.R.Civ.P. 59 is DENIED; and it is

FURTHER ORDERED that Plaintiff's motion for an award of attorney fees pursuant to 42 U.S.C. § 1988 is granted in the amount of $61,019.83.

It is so ordered.

DATED: September 1st, 2004.

s/ Jose L. Linares
JOSE L. LINARES
UNITED STATES DISTRICT JUDGE

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED DECEMBER 22, 2003 AND FILED DECEMBER 23, 2003 DENYING PERKINS-AUGUSTE'S MOTION TO CERTIFY ISSUES FOR APPEAL

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.: 01-1844 (JLL)

ARMENIO T. MONTEIRO,

Plaintiff,

v.

CITY OF ELIZABETH, *et al.*,

Defendants.

OPINION AND ORDER

This matter comes before the Court on behalf of Defendants Patricia Perkins-Auguste in a motion for the Court to amend its previous Order and certify issues for appeal pursuant to 28 U.S.C. § 1292(b). The Court decides this motion without oral argument. Fed.R.Civ.P. 78. For the reasons set forth below, this motion is denied.

Background

The underlying facts in this case were discussed in detail in this Court's Opinion & Order of November 12, 2003 and need not be repeated for purposes of the present motion. In that Opinion, this Court granted summary judgment to all Defendants except for Defendant Patricia Perkins-Auguste.

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The Court found that Defendants Cox and Meola were entitled to qualified immunity from the pending § 1983 action because they held a reasonable belief that they had probable cause to arrest Plaintiff Monteiro. The Court also found that Defendant City of Elizabeth could not be held liable for the actions of the individual Defendants because Perkins-Auguste did not act as a "final policy-maker" for the City of Elizabeth in her decision to expel Plaintiff from the Council meeting.

As for the First Amendment claims asserted against Defendant Perkins-Auguste, the Court rejected her claim for absolute legislative immunity. The Court also rejected her claim for qualified immunity since it was unclear whether Plaintiff was silenced by Defendant Perkins-Auguste at the Council meeting based on the content of Plaintiffs speech or based on the need to maintain order at the Council meeting. On this issue, the Court elaborated:

> On the one hand, Ms. Perkins-Auguste's actions taken against Plaintiff could be considered her reasonable attempts, consistent with §§ 3, 13B and 16 of the City's Rules, to prevent Plaintiff from continuing to disrupt her and to promote the orderly procession of business. As Defendant stated at her deposition: "As council president it's up to me to make sure that the other council members stick to the matters at hand, and if I perceive that he or she is going off the subject matter, it's up to me . . . to make sure they stick to the matter." (Shotter, Exh. B, Deposition of Perkins-Auguste, 24). On the other hand, a fact finder hearing the history between the parties, the

words that were actually said at the meeting, and viewing Plaintiff's conduct as shown in the videotape, could reasonably conclude that the Plaintiff was not being disruptive and that Ms. Perkins-Auguste's actions were motivated by her antipathy to Plaintiff's particular outspoken views on the budget and his alleged sponsorship of the "offensive" flier that attacked the city's budgetary proposals. Indeed, prior to the event, Defendant was aware of Plaintiff's views and knew that he was going to vote and argue against the budget. (*Id.* at 62). Therefore, material questions of fact exist as to whether Defendant's motive for acting against Monteiro resulted from the content of his speech (constitutionally impermissible) or was an appropriately-limited time, place and manner restriction (constitutionally permissible).

A rational jury could infer that Defendant Perkins-Auguste singled Plaintiff out because of the content of his speech, or that she was merely trying to maintain order for the efficient administration of her legislative responsibilities. If Ms. Perkins-Auguste's motivation in removing Mr. Monteiro was her animosity towards him and the desire to stifle his views on the budget, then Ms. Perkins-Auguste as a reasonable public official would have known that her specific conduct violated the Plaintiff's clearly established rights and was not subject to qualified immunity. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In as much as these questions must be resolved by a trier of

> fact and determined perhaps through the use of a specifically-tailored jury verdict questionnaire, it would be improper to determine this matter via summary judgment. Therefore, summary judgment is denied as to the First Amendment claims against Defendant Perkins-Auguste.

Presently before the Court is an Affidavit by counsel for Defendant Perkins-Auguste, dated December 1, 2002, asking the Court to amend its previous Order so as to certify the issues for interlocutory appeal.

Legal Discussion

The district court has discretion, pursuant to 28 U.S.C. § 1292(b), to certify issues for interlocutory appeal to the United States Courts of Appeals. To show that circumstances exist to justify certification, the moving party bears the burden of showing (1) that the order at issue involves a controlling issue of law, which if erroneously decided, would result in reversible error on final appeal, (2) that there is substantial ground for difference of opinion about the resolution of the issue, and (3) that an immediate appeal will materially advance the ultimate termination of litigation.[1]

1. 28 U.S.C. § 1292(b) states that

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal

(Cont'd)

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See Katz v. Carte Blanche Corp., 496 F.2d 747, 754-55 (3d Cir. 1974); *Waldorf v. Borough of Kenilworth*, 959 F.Supp. 675, 679 (D.N.J.1997).

Interlocutory appeal under § 1292(b) is to be "used sparingly." 16 CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE, § 3929, at 134 (1977). A Section 1292(b) certification is limited to cases where "exceptional circumstances" justify the general policy of postponing appellate review until entry of a'final order. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 1999 U.S. Dist. LEXIS 22891, at *14 (D.N.J. Jul. 27, 1999) (quoting *Hulmes v. Honda Motor Co., Ltd.*, 936 F. Supp 195, 208 (D.N.J. 1996), aff'd, 141 F.3d 1154 (3d Cir.1998)). It is well-established that certification is inappropriate where the movant merely disagrees with an adverse ruling of the District Court. *See e.g., P. Schoenfeld Asset Mgmt., LLC v. Cendant Corp.*, 161 F. Supp. 2d 355, 358 (D.N.J. 2001). *Electric Mobility Corp. v. Bourns Sensors/Controls*, 87 F. Supp. 2d 394, 398 (D.N.J. 2000); *Kapossy v. McGraw-Hill, Inc.*,

(Cont'd)

> from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

942 F.Supp. 996, 1001 (D.N.J. 1996). The difference of opinion must arise out of genuine doubt as to the correct legal standard. Hulmes, 936 F.Supp. at 207. Moreover, certification is not mandatory even if the aforementioned three criteria are met; rather, certification is wholly discretionary. *See Bachowski v. Usery*, 545 F.2d 363, 368 (3d Cir.1976).

In the case at bar, Defendant Perkins-Auguste has failed to convince the Court that certification for interlocutory appeal is appropriate or necessary. In presenting its motion, Defendant argues that "since the Court found there was probable cause to arrest the plaintiff . . . the defendant, Patricia-Perkins [sic] Auguste, as a matter of law is entitled to qualified immunity." Outside of this declaration, counsel provides no additional facts, case law or legal analysis to support this assertion. Such supplementary material would have been exceedingly helpful, as the Court cannot decipher any reason why Defendant Perkins-Auguste's liability should hinge on whether Defendants Cox and Meola had probable cause to arrest Plaintiff. As mentioned above, Defendant Perkins-Auguste was denied qualified immunity because her motives for silencing Plaintiff were unclear, and because a rational jury could reasonably find either that she acted improperly in singling Plaintiff out based on the content of his speech or properly by trying to maintain order in the Council meeting. Whether Perkins-Auguste's underlying motive for having Plaintiff arrested was consistent with the First Amendment or not, based on the "totality of circumstances," Defendants Cox and Meola would still have had probable cause to arrest Plaintiff.

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In the present case, there exists no genuine doubt as to the correct legal standard. The legal framework under the First Amendment when considering governmental restrictions on speech in designated public forums – whether the restrictions are content-neutral, narrowly-tailored to serve a significant government interest, and whether alternative methods of communication were left open – is well-settled. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). Section 1292(b) allows certification only of questions of "law." Where, as here, the controlling issues are questions of fact, or, more precisely, questions as to whether genuine issues of material fact remain to be tried, the federal scheme does not provide for an immediate appeal. *See e.g., Harriscom Svenska AB v Harris Co .*, 947 F.2d 627, 631 (2d Cir. 1991); *Danaher Corp. v. National Union Fire Ins. Co. of Pittsburgh, Inc.*, 1996 WL 65449, at *2 (E.D.Pa. Feb 14, 1996); *see also* 16 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3930, at 161 (1977).

Not only is there no "controlling question of law" implicated in the Court's particular ruling concerning qualified immunity but neither is there a "substantial ground for difference of opinion" as to the resolution of the issue. Defendant summarily concludes, again with no supporting legal arguments or case law, that the "Court's Order denying summary judgment as to defendant, Patricia-Perkins-Auguste, involves a controlling question of law as to which there is substantial grounds for difference of opinion." Defendant does not point to precedents indicating a split of authority on this issue which might suggest a substantial ground for difference of opinion justifying interlocutory review. Nor does Defendant

claim that this is a matter of first impression within this Circuit. The Court draws jurisprudential support in its decision to deny summary judgment and await trial to resolve these factual issues from the nearly identical cases of *Musso v. Hourigan*, 836 F.2d 736 (2d Cir. 1988) and *Wilkinson v. Bensalem Township*, 822 F. Supp. 1154, 1158 (E.D.Pa. 1993). In *Musso*, unruly citizens at a Board of Education public meeting were arrested and removed. In plaintiffs First Amendment claim against a board member, the court found that genuine issue of fact remained as to whether defendant silenced plaintiff because of his disagreement with the content of plaintiffs speech or not, and therefore denied summary judgment. 836 F.2d at 743. In *Wilkinson*, the court likewise was confronted with a civil rights suit against the township, council members and council president, alleging that the defendants violated his right to freedom of expression at township meeting. The court noted that because the motives of the council president when silencing plaintiff were ambiguous, there existed "a very difficult line to draw in an area of core First Amendment concerns. It should not be drawn on a summary judgment record." 822 F. Supp. at 1161. Based on these decisions, and the absence of any cases or any colorable arguments that would suggest a contrary legal conclusion, the Court rejects the notion that there is a substantial difference of opinion as to the denial of qualified immunity at this juncture. Defendant has not presented beyond mere disagreement with the Court's ruling, which does not constitute a substantial ground for difference of opinion under Section 1292(b). *P. Schoenfeld Asset Mgmt.*, 161 F. Supp. 2d at 360 (D.N.J. 2001).

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Finally, Defendant provides the Court with no reason to believe that permitting an immediate appeal on the denial of qualified immunity would materially advance the ultimate termination of the litigation. Under the two-tiered process of 1292(b), the appellate court must use its discretion in determining whether it should accept the district court's order for interlocutory appeal. Then, the appellate court must make its actual decision on the merits of the matter certified. This process would undoubtedly take a considerable amount of time. If the proper resolution of a dispositive legal question was in doubt, it would make sense to advance the interlocutory appeal so that the issue could be settled before setting into motion what may become a lengthy trial. However, in a case like the one currently before the Court, where the matter for certification involves no controlling question of law and no substantial difference in opinion, certification would only delay, rather than hasten, the ultimate termination of the case, and unnecessarily waste both judicial and litigant resources. *See Hulmes*, 936 F.Supp. at 211; *see also Singh v. Daimler-Benz AG*, 800 F. Supp. 260, 263 (E.D.Pa. 1993). It is in both the interests of the parties and the efficient administration of justice to proceed to trial, where a trier of fact can resolve the remaining disputed issues concerning Defendant Perkins-Auguste's qualified immunity claims.

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Conclusion

For the reasons stated herein, this Court will deny Defendant's motion for 28 U.S.C. § 1292(b) certification of the qualified immunity issue. Defendant has failed to meet its burden of showing a substantial ground for difference of opinion on a controlling question of law, or that an interlocutory appeal would materially advance the ultimate termination of the litigation. Consequently, it is on this 22nd day of December, 2003, hereby:

ORDERED that Defendant's motion for certification of appeal pursuant to 28 U.S.C. § 1292(b) is DENIED.

DATED: December 22nd, 2003

s/ Jose L. Linares
JOSE L. LINARES
UNITED STATES DISTRICT JUDGE

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED NOVEMBER 12, 2003 DENYING PERKINS-AUGUSTE'S MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.: 01-1844 (JLL)

ARMENIO T. MONTEIRO,

Plaintiff,

v.

CITY OF ELIZABETH, *et al.*,

Defendants.

OPINION & ORDER

LINARES, District Judge.

This matter comes before the Court on the motion of Defendants City of Elizabeth, Patricia Perkins-Auguste, Andrew R. Cox and Richard Meola (collectively, "Defendants") for summary judgment pursuant to Fed.R.Civ.P. 56. Plaintiff Armenio Monteiro commenced suit against Defendants on various state law and constitutional claims. Oral argument was held on October 20, 2003. For the reasons stated herein, the summary judgment motions as to Defendant City of Elizabeth and as to Defendants Cox and Meola are granted.

Appendix D

The summary judgment motion as to Defendants Perkins-Auguste is denied.

I. Background Facts

Mr. Monteiro was a member of the City Council in Elizabeth, New Jersey. Ms. Perkins-Auguste served as Council President. On April 10, 2001, both Monteiro and Perkins-Auguste attended a City Council public meeting to discuss the adoption of the annual budget of the City of Elizabeth. Prior to the meeting, fliers were circulated around the city encouraging residents to attend the public meeting and voice their concerns over the proposed budget which allegedly threatened to increase their taxes. Mr. Montiero's name had been placed on the fliers as supporting those concerns.

During the public meeting, various Council members made comments on the budget. Mr. Monteiro spoke for twenty-four minutes about his opposition to the budget. He was not interrupted except for the occasional warnings by Ms. Perkins-Auguste to keep the conversation on point. Later, when it was Ms. Perkins-Auguste's turn to speak, she stated, among other things, that the fliers that circulated through the city constituted "deception with Mr. Montiero's name on it." In reaction to this reference, Mr. Monteiro interrupted Ms. Perkins-Auguste's speech. Ms. Perkins-Auguste ruled Monteiro out of order, commanded him to keep quiet and threatened to remove him from the meeting. Mr. Monteiro continued to speak despite this ultimatum.

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Officer Andrew Cox and Sergeant of Police Richard Meola, employed by the Elizabeth Police Department, had been told to attend the meeting in case any problems were to arise. Ms. Perkins-Auguste eventually asked these officers to escort Mr. Monteiro from the meeting. The officers repeatedly asked Mr. Monteiro to leave voluntarily, but he refused, asserting that his First Amendment rights were being violated. Mr. Cox and Mr. Meola then placed him under arrest for disrupting a public meeting in violation of N.J.S.A. 2C: 33-8. This arrest was publicly-recorded and was apparently broadcast on multiple news programs.

On April 18, 2001, Mr. Monteiro ("Plaintiff") instituted suit against the City of Elizabeth, Council President Patricia Perkins-Auguste, Officer Andrew Cox and Sergeant Richard Meola. Plaintiff's Complaint asserted state law claims for false imprisonment and false arrest (Count Four), violation of a right to privacy (Count Five), assault (Count Six), violation of the "public policy of New Jersey" (Count Seven and Ten), intentional infliction of emotional harm (Count Nine) and violation of the rules and policies governing the Elizabeth City Council (Count Eleven). Plaintiff also asserted federal claims under 42 U.S.C. § 1983 for violations of the First Amendment (Count One), procedural and substantive due process clause (Count Two) and the right to privacy (Count Five). At oral argument, Plaintiff voluntary dismissed all state law claims against Defendants and agreed to proceed only as to his federal claims for Counts One (First Amendment), Two (procedural and substantive due process)

and Five (right to privacy).[1] Although not entirely clear, it appears that Count Four for false arrest was also not voluntarily dismissed.[2] Presently before this Court is Defendants' motion for summary judgment on the remaining claims.

II. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment may be granted only when the evidence contained in the records shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Serbin v. Bora Corp.*, 96 F.3d 66, 69, n.2 (3d Cir. 1996). In determining whether there remain any actual issues of factual dispute, the court must resolve all reasonable doubts in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3d Cir. 1983). At the summary judgment stage, "the judge's function is not himself to weigh the evidence and.determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 249 (1986).

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1. Plaintiff also agreed that Count Three (§ 1983 general claim) should be merged with Counts One, Two and Five. (Transcript of Proceedings, October 20, 2003, at 4) ("Transcript").

2. At oral argument, Plaintiff agreed to dismiss most of his claims. He also initially agreed to dismiss Count 4 of his Complaint relating to false arrest. (Transcript, at 4). However, he subsequently indicated that he retained his false arrest allegations in the context of § 1983 and the Fourth Amendment. (Transcript, at 40). The Court will adhere to the latter characterization and assume that the false arrest claim remains open.

The moving party bears the initial burden of identifying evidence that demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Once that burden has been met, it is incumbent upon the nonmoving party to set forth specific facts showing that there is a genuine issue for trial. *Anderson*, 477 U.S. at 248. The non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Thus, if the non-movant's evidence on any essential element of the claims asserted is merely "colorable" or is "not significantly probative," the court should enter summary judgment in favor of the moving party. *Anderson*, 477 U.S. at 249-250. In other words, the non-moving party must "make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial. *Serbin*, 96 F.3d at 69, n.2. Keeping in mind the fact that this matter comes to this Court in this particular procedural posture, the Court will now turn to the issues presented in this case.

III. Legal Discussion

A. § 1983 and Immunity

There are certain requirements for establishing a constitutional claim under 42 U.S.C. § 1983. Section 1983 reads, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 does not create substantive rights; instead "it provides only remedies for deprivations of rights established elsewhere in the Constitution or federal laws." *Kneipp v. Tedder*, 95 F.3d 1199, 1204 (3d Cir. 1996). A Section 1983 action has two essential elements: 1) that the conduct complained of was committed by a person acting under color of state law; and 2) that the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Powell v. Ridge*, 189 F.3d 387, 400 (3d Cir. 1999). As the parties do not dispute the first factor, the Court will focus solely on whether Defendants' conduct deprived Plaintiff of a right that is actionable under Section 1983.

If Plaintiff sets forth *a prima facie* case for a 1983 violation, the Court must determine which of the Defendants, if any, are entitled to immunity for their actions. The United States Supreme Court has emphasized the importance of resolving immunity questions at the earliest possible stage in litigation because "[t]he entitlement is an immunity from suit rather than a mere defense to liability." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Qualified immunity shields state officials performing discretionary functions from suit for

damages if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In evaluating qualified immunity claims, a court "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Conn v. Gabbert*, 526 U.S. 286, 290 (1999); *Wilson v. Russo*, 212 F.3d 781 (3d Cir. 2000). If a clearly established right has been violated, it must then be considered whether in light of the circumstances known to the officer at the time, a reasonable officer would have known that his conduct violated the right; if a reasonable officer would have so known, then an officer is not entitled to immunity for such actions. *See Harlow*, 457 U.S. at 813-20; *Bartholomew v. Commonwealth of Pennsylvania*, 221 F.3d 425, 428 (3d Cir. 2000); *Nannav v. Rowan College*, 101 F. Supp.2d 272 (D.N.J. 2000). In determining whether a government official is entitled to immunity, both the existence of a clearly established right and the objective reasonableness of the officer's actions are questions of law for the Court to decide. *See Curley v. Klem*, 298 F.3d 271, 278 (3d Cir. 2002).

B. Claims Against Defendants Cox and Meola

In moving for summary judgment on Plaintiffs claims, Defendants Officer Cox and Sergeant of Police Meola invoke the doctrine of qualified immunity. Under the qualified immunity doctrine, this Court must first ask whether "the facts alleged, [when] viewed in the light most favorable to

the party asserting the injury, show that the officers conduct violated a constitutional right." *Curley*, 298 F.3d at 277 (citing *Saucier v. Katz*, 533 U.S. 194 (2001)). If the facts alleged are sufficient to demonstrate a constitutional violation, the court must then determine whether the right asserted was "clearly established" at the time of the officer's allegedly unlawful conduct. *Id.* This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 194. Defendants are entitled to qualified immunity only if the Court can conclude, based on the undisputed facts in the record, that Defendants reasonably, though perhaps mistakenly, believed that their conduct was lawful in light of the clearly established law and the information known to them at the time of the alleged constitutional violation. *Mantz v. Chain*, 239 F. Supp.2d 486, 496 (D.N.J. 2002).

Although not entirely clear from the statements by Plaintiffs counsel at oral arguments, at least vis a vis Defendants Cox and Meola, it appears that Plaintiff asserts only a false arrest claim under § 1983.[3] To maintain a claim

3. *See supra* note 2 concerning false arrest claim. Plaintiff's other remaining claims do not apply to Defendants Cox and Meola, and Plaintiff makes no assertions to the contrary in its papers. The First Amendment claim is really only directed toward other Defendants as there are no allegations that Cox or Meola impinged upon Plaintiff's free speech rights. Moreover, Plaintiff points to no case law and provides no evidence to believe otherwise.

To the extent that these other constitutional claims are indirectly alleged against Defendants Cox and Meola, this Court grants summary judgment. Plaintiffs mere unsubstantiated allegations are

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for unlawful arrest under § 1983, a plaintiff must prove that he was arrested by a state actor without probable cause. *Sharrar v. Felsing*, 128 F.3d 810, 827 (3d Cir. 1997). Courts have long recognized the constitutional prohibition against arrests without probable cause. *See. e.g.*, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 (1972). *Orsatti v. New Jersey State Police*, 71 F.3d 480, 482 (3d Cir. 1995); *Schneider v. Simonini*, 163 N.J. 336, 360-362 (2000) (illustrating the long line of state and federal cases that have defined the law of probable cause). This right is clearly-established and Defendants do not argue otherwise.

The parties do, however, dispute whether Defendants had probable cause to make the arrest. Probable cause exists if at the time of the arrest "the information within the arresting officer's knowledge at the time of the arrest is sufficient to warrant a reasonable law enforcement officer to believe that an offense has been or is being committed by the person to be arrested. *Paff v. Kaltenbach*, 204 F.3d 425, 436 (3d Cir. 2000). *See also Beck v. Ohio*, 379 U.S. 89, 91 (1964). Probable cause is "more than mere suspicion" but "does not

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insufficient to defeat summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (once the moving party has properly supported its motion, "its opponent must do more than simply show that there is some metaphysical doubt as to material facts.") A non-movant may not "rest upon mere allegations, general denials or . . . vague statements." *Ouiroga v. Hasbro, Inc.*, 934 F.2d 497, 500 (3d Cir. 1991). When the non-moving party's evidence in opposition to a properly-supported motion for summary judgment is merely "colorable" or "not significantly probative," the Court may grant summary judgment. *Castro v. Johnson*, 1994 WL 386385, at *3 (D. N.J. 1994) (citing *Anderson*, 477 U.S. at 249-250).

require that the officer have evidence sufficient to prove guilt beyond a reasonable doubt." *Orsatti*, 71 F.3d at 482-483. A common sense approach must be taken to the issue of probable cause and a determination made based on "the totality of the circumstances." *Sharrar*, 128 F.3d at 818. If no facts are in dispute, the existence of probable cause can be determined by the trial judge as a matter of law. *See Crescent City Live Stock Landing & Slaughter House Co. v. Butchers' Union Slaughter House & Live Stock Landing Co.*, 120 U.S. 141 (1887); *Bristow v. Clevenger*, 80 F. Supp. 2d 421, 433-434 (M.D. Pa. 2000). Because this analysis is done within the context of a qualified immunity discussion, this Court need not examine whether Plaintiff in fact committed the offense for which he was arrested, but only whether Defendants' belief in the legality of arresting Plaintiff was reasonable. *See Groman v. Township of Manalapan*, 47 F.3d 628, 634 (3d Cir. 1995).

The relevant facts underlying the false arrest claim are not in dispute but only the proper characterization of those facts. Officers Cox and Meola placed Plaintiff under arrest for disrupting a public meeting in violation of N.J.S.A. 2C:33-8. That statute states:

> A person commits a disorderly persons offense with purpose to prevent or disrupt a lawful meeting, procession or gathering, he does an act tending to obstruct or interfere with it physically.

~~N.J.S.A.~~ 2C:33-8.

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Plaintiff alleges that no reasonable person could conclude that Monteiro violated § 2C:33-8, and therefore the law enforcement officials lacked probable cause to arrest him. Defendant Cox stated that he had probable cause to arrest Plaintiff after he interrupted the City Council President for the second time "unprovoked with anything she said to him." (Certification of John J. Shotter, Esq., (hereinafter "Shotter"), Exh. F, Cox Deposition, 75). The temporary recess called due to the ensuing tumult "is what finalized the fact that [Plaintiff] was disturbing the meeting, because if he hadn't been acting the way he was, there wouldn't have been a need for the recess to be called." (*Id.*) Defendant Meola too believed that Plaintiff's actions were "obstructive" and asserted that "when the meeting cannot continue because of [Plaintiff's] inaction, he is in effect violating the statute." (Shotter, Exh. F, Meola Deposition, 89, 92). After viewing the tape of the incident and the record, and upon examining the clearly-established law in existence at the time of the incident, this Court concludes that Defendants Cox and Meola were reasonable in their belief that they had probable cause to make the arrest. Therefore, for the reasons stated herein, they are entitled to qualified immunity.

Only two reported decisions have construed N.J.S.A. 2C:33-8. In *State v. Kane*, 303 N.J.Super. 167 (App. Div. 1997), the criminal defendant knowingly violated the rules of a public budget committing hearing by shouting to attract the attention of the chairman. In that case, the court found the arrest was invalid because the police offers precipitously arrested the defendant without any orders from the chairman. It pointed out the important distinction between officers unilaterally arresting someone, which should only be done

if the conduct is "outrageous", and officers arresting someone upon the orders of the chairman, which is granted more deference. *Id.* at 180. In *State v. Charzewski*, 356 N.J.Super. 151 (App. Div. 2002), the court reversed a conviction of a citizen who was escorted by police out of a public meeting at the mayor's request for being disruptive. Although noting that defendant's conduct presented a "close" legal question, *Id.* at 158, the court found that it could not be shown beyond a reasonable doubt that defendant purposefully disrupted the meeting.

Neither *Kane* nor *Charzewski* detract from the reasonableness of Defendants' probable cause determination. Unlike the officers in *Kane*, the Defendants in the present case arrested Plaintiff after Chairman Perkins-Auguste demanded that they do so. Although the officers have testified that they did not arrest Plaintiff based on the chairwoman's requests, the request was in fact made and was part of the "totality of the circumstances" surrounding their decision. Even if the outcome in *Charzewski* could tend to support Plaintiff's probable cause contention, the court there noted the difficulty in reaching its legal decision. It is surely not "unreasonable" if Defendants arrived at a conclusion different from what the *Charzewski* court admitted was a close question. In any event, the *Charzewski* decision was decided after the events in dispute, and therefore, should not be considered part of the universe of "clearly-established" law at the time Defendants acted.[4]

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4. The few reported cases discussing the predecessor statute, N.J.S.A. 2A:170-28 (repealed 1979) also support the reasonableness of Defendants' beliefs. *See State v. Smith*, 46 N.J. 510 (1966)

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The legal commentary on this section sheds light on what is a reasonable interpretation, stating that:

> As noted, the section is limited to physical. interference. . . . That is not to say that speech could never be physically disruptive; where an actor's speech was intended to make it impossible for the person addressing the meeting to be heard, speech would constitute a physical obstruction. Similarly, if a person with no privilege to speak in a meeting repeatedly interrupted it, he might well be in violation of the section whatever the content of his speech.

State v. Kane, 303 N.J.Super. 167, 176 (App. Div. 1997) (*quoting* Cannel, *New Jersey Criminal Code Annotated*, comment 2 on N.J.S.A. 2C:33-8 (1997)).

See also White v. City of Norwalk, 900 F.2d 1421, 1426 (9th Cir. 1990) ("A speaker may disrupt a Council meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies. The meeting is disrupted because the Council is prevented from accomplishing its business in a reasonably efficient manner.") In similar fashion, although Plaintiff did not physically obstruct the

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(Cont'd)

(convictions affirmed of citizens who disturbed Trenton City Council public meeting and refused to leave after warnings); *State v. Moore*, 101 N.J.Super. 419 (App. Div. 1968) (convictions affirmed of citizen at Newark Planning Board public meeting who was ruled out of order and asked to leave the microphone several times for quarreling with the chairman).

meeting, by "repeatedly interrupting" a meeting when he had no privilege to speak, and making it "impossible for [Ms. Perkins-Auguste] to be heard," his actions could in the eyes of a reasonable police officer constitute disruption and a violation of 2C:33-8.

A plain reading of the statute and rules also indicates the reasonableness of the officers' decision to arrest Plaintiff. Based on the undisputed events, it is certainly reasonable to believe that Plaintiff was purposely "disrupting" the City Council meeting and "obstructing" it from proceeding. This Court's review of the videotape of the meeting showed that Defendants arrested Plaintiff only after he had repeatedly refused to comply with several verbal warnings. Despite warnings to settle down, Plaintiff purposefully and repeatedly interrupted the Chair of the Council when it was the Chair's proper turn to speak. He was informed that his failure to quiet down would lead to his expulsion from the meeting. As a result, the meeting was at a standstill and unable to proceed. The videotape clearly shows Defendants Cox and Meola behaving courteously towards Plaintiff and aware of a presumably valid request from Ms. Perkins, an official presiding over a public hearing. The "totality of circumstances" demonstrates to this Court that no reasonable police officers would believe that their conduct violated Plaintiff's clearly-established rights, and therefore, under the circumstances of this case, their actions are entitled to qualified immunity. Accordingly, summary judgment is granted to Defendants Cox and Meola.

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C. Claims Against Defendant Perkins-Auguste

1. Absolute immunity claim

At the time of the alleged constitutional violation, Defendant Perkins-Auguste was clearly acting in her capacity as president of the Elizabeth City Council and as an elected councilwoman for the City of Elizabeth. Therefore, before addressing any of the specific claims asserted against Defendant Perkins-Auguste, the Court must as a threshold matter consider her claim of entitlement to absolute legislative immunity.

Local legislators are absolutely immune from suit under § 1983 for their legislative activities. *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998). Whether an act is legislative and thus entitled to immunity turns on the nature of the act. *Id.* at 55. "[L]ocal government bodies are given a combination of proprietary, managerial and legislative powers. It is only with respect to the legislative powers delegated to them by the state legislatures that the members of local governing boards are entitled to absolute immunity." *Ryan v. Burlington County*, 889 F.2d 1286, 1290 (3d Cir. 1989). In the Third Circuit, Defendant Perkins-Auguste is entitled to absolute immunity from Plaintiff's claims only if her acts are deemed "legislative" in character, meaning that they are both "substantively" and "procedurally" legislative. *Id.* at 1290-1291. An act that is substantively legislative often involves "policy-making of a general scope" whereas a decision that affects a "small number or a single individual" may be characterized as administrative. *Id. But cf. Acierno v. Cloutier*, 40 F.3d 597, 611 (3d Cir. 1994) (modifying *Ryan*

by stating that the number of persons affected by a given decision is an important but not dispositive factor). For an act to be procedurally legislative, it must be "passed by means of established legislative procedures" so that the "act is a legitimate, reasoned decision representing the will of the people which the governing body has been chosen to serve." *Ryan*, 889 F.2d at 1291.

Absolute legislative immunity will not protect Defendant Perkins-Auguste from the actions she took against Plaintiff. Although her decision to expel Plaintiff from the council meeting was made against a backdrop of legislative debate over the city's budget, her acts are better characterized as part of her management duties as chairwoman rather than legislative. The incident which led to Plaintiffs arrest did not arise from any dispute over the *substance of* legislation or current affairs, but rather over the manner in which the Council meeting was being conducted, in other words, over the *process* of legislating. The quarrel originated in matters peripheral to the legislative discussion — namely, the alleged *ad hominem* attacks by Perkins-Auguste and the alleged disruption of the meeting by Plaintiff in interrupting Perkins-Auguste's speech. In taking her actions, Defendant was presumably attempting to oversee the administration of the Council meeting. Her acts were not "substantively legislative" as defined by the Third Circuit, since they did not involve policy-making of any kind, but rather were ad hoc actions taken against one person. The acts were also not "procedurally legislative" as they were not established through anything resembling the typical legislative procedure. It cannot be fairly stated that Defendant's actions represent a "legitimate, reasoned decision representing the will of the people."

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Although the application of legislative immunity to this particular context has not been addressed by the Third Circuit, other courts have on occasion addressed immunity questions under circumstances similar to those currently before the Court. In *Hansen v. Bennett*, 948 F.2d 397 (7th Cir. 1991), a public city council meeting attendee was removed after speaking out of order and squabbling with the mayor. The court noted that the "applicability of absolute immunity to the enforcement of rules governing parliamentary procedure is an open question. To the best of our knowledge, no court has held that enforcing such rules is a legislative act." *Id.* at 400. The *Hansen* court refused to extend absolute immunity to the mayor in that case, holding that the mayor's actions in regulating an open public discussion of various issues were not taken in a legislative capacity. *Id.* at 403. Similarly, in *Kamplain v. Curry County Bd. of Comm'rs*, *159* F.3d 1248 (10th Cir. 1998), the County Board's decision to ban plaintiff from future Commission meetings for his behavior was deemed an administrative, and not a legislative act for immunity purposes. The court found that these actions were taken to monitor and discipline plaintiff's presence and prevent him from disrupting future meetings, and that even though they acted during a regularly scheduled meeting, the acts were not taken in a legislative capacity. *Id.* at 1252. *But cf. Collinson v. Gott*, 895 F.2d 994, 1008 (4th Cir. 1990) (in concurring opinion, Judge Wilkinson arguing that the act of a Board President in ruling a speaker out of order should be deemed a legislative function, a "discretionary act [that] was an integral part of the legislative process.") Although the aforementioned cases are by no means definitive as to how the present matter must be decided, they certainly suggest that the denial of absolute legislative immunity is proper under the specific circumstances of the case at bar.

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This Court recognizes the need to grant absolute legislative immunity in certain instances to ensure that a legislator will "consider the best interests of the people he serves, not the size of his own wallet." *Carver v. Foerster*, 102 F.3d 96, 103 (3d Cir. 1996). "[T]he result of personal liability is the chilling of potentially beneficial legislative activity and the distraction of public officials from community matters." *Id.* Members of city councils must be able to make decisions without fear of litigation or the interests of the public would not be well-served. At the same time, courts must be careful not to expand absolute legislative immunity too broadly so as to give legislators free license to unconstitutionally limit the right of free speech and the unabashed exchange of ideas at a forum such as a public meeting, and thereby by virtue of the immunity defense prevent the vindication of liberties lost.

The legal framework dictates this Court's conclusion. The contours of the legislative immunity doctrine cannot be so amply stretched so as to encompass the Defendant's actions in this case. A finding that the discretionary unilateral acts of an official that directly affect only one individual should be deemed "legislative" so as warrant immunity would run counter to the Supreme Court's narrow construction of legislative immunity. *See, e.g., United States v. Brewster*, 408 U.S. 501, 528 (1972) (under Speech and Debate Clause, refusing to protect those activities "that are casually or incidentally related to legislative affairs but not a part of the legislative process itself). As a result, Defendant's assertion of absolute legislative immunity must be denied.

2. Qualified immunity

a. First Amendment claims

Plaintiff alleges that Defendant Perkins-Auguste violated his First Amendment rights.[5] This Court, having found that absolute legislative immunity does not apply to Defendant Perkins-Auguste, now turns to the determination of whether qualified immunity is appropriate. As previously stated, the qualified immunity analysis requires an examination of whether Plaintiff has alleged the deprivation of a clearly-established constitutional right and, if such a deprivation occurred, whether a reasonable person in Ms. Perkins-Auguste's position would have known at the time that her conduct violated that right.

The nature of the First Amendment violation alleged in this case was not clearly expressed by Plaintiff. The claim

5. Plaintiff's false arrest claim is not addressed toward Defendant Perkins-Auguste and to any degree it was, the claim fails for the same reasons it failed against Defendant Cox and Meola, as Defendant Perkins-Auguste was within her discretion and had probable cause to direct the officers to remove Plaintiff from the proceedings. In as much as plaintiff's due process claims are intertwined with the right to privacy claim, they are addressed later in this opinion. To the extent that this claim alleged is one for substantive due process, this Court need not rule on it, as it appears that more specific constitutional allegations better address the issue. *See Graham v. Connor*, 490 U.S. 386, 395 (1989) (stating that "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims."

appears to be based on his expulsion from the city council meeting, an act which precluded him from continuing to express his views on the annual budget at a public forum.

The free speech guarantees set forth in the First Amendment are not unlimited. *See, e.g., Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) ([T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.") The degree to which the government can limit speech depends on the type of forum at issue. In determining whether Plaintiff has asserted a valid claim under the First Amendment, this Court must examine (1) whether Plaintiff's speech is protected by the First Amendment; (2) whether the Council meeting should be denominated as a public, designated, or nonpublic forum; and (3) whether Defendant's justifications for limiting Plaintiff's speech satisfy the corresponding standard for that forum. *See Zapach v. Dismuke*, 134 F. Supp.2d 682, 687 (E.D. Pa. 2001) *(citing Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985).

Plaintiffs ability to speak on public issues at public meetings undoubtedly rests within the scope of the First Amendment. "[C]ourts have consistently recognized that local officials presiding over duly-called public meetings may offend First Amendment rights when they make *ad hoc* parliamentary rulings," *Wilkinson v. Bensalem Township*, 822 F. Supp. 1154, 1158 (E.D. Pa. 1993) (citing to various cases) (emphasis in original). Moreover, Courts have repeatedly held that actions by a legislature that adversely affect a member's participation violate that member's First Amendment rights.

Parker v. Merlino, 646 F.2d 848, 853 (3d Cir. 1981). *See e.g.*, *Bond v. Floyd*, 385 U.S. 116, 135-136 (1966) (refusal of Georgia legislature to seat plaintiff because of his views on Vietnam War violated plaintiff's First Amendment rights as "[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. . . . [S]tatements criticizing public policy and the implementation of it must be . . . protected."); *DeGrassi v. City of Glendora*, 207 F.3d 636, 646 (9th Cir. 2000) ("Restrictions on a council member's ability to attend council meetings and address matters of public concern may infringe the member's First Amendment rights"); *Kucinich v. Forbes*, 432 F. Supp. 1101 (N.D. Ohio 1977) (First Amend-ment prohibited a City Council from suspending one of its members for making allegedly defamatory remarks about the Council President); *Ammond v. McGahn*, 390 F. Supp. 655 (D.N.J. 1975), *rev'd on other grounds*, 532 F. Supp. 655 (3d Cir. 1976) (Democratic New Jersey State Senator could not be excluded from New Jersey State Democratic Caucus because of her public statements criticizing some Caucus members).

As for the forum classification, a designated public forum exists when the government opens the meetings "for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802. Courts have identified a designated public forum when a governmental body gives the public an opportunity to address the body at its meeting, as the City of Elizabeth did in the case at bar. *See, e.g., Mesa v. White*, 197 F.3d 1041, 1046 (10th Cir. 1999); *Collinson v. Gott*,

895 F.2d 994, 1000 (4th Cir. 1990) *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990); *Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989). Accordingly, the City of Elizabeth's council meeting is best characterized as a designated public forum.

The incident in question having taken place at a designated public forum, the issue becomes whether Defendant's restrictions on Plaintiff's speech within this setting were constitutionally justifiable. In a designated public forum, the government can permissibly subject speech to time, place, and manner restrictions as long as the restrictions (1) are "content-neutral" – that is, justified without reference to the content of the regulated speech, (2) are narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication of this information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks omitted); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

Plaintiff does not challenge the constitutional validity of the City of Elizabeth's Rules of Procedure generally but rather as applied in this case by Defendant Perkins-Auguste. The duty of the president under the governing rules of procedure requires her to "[r]ule on all questions of order, subject to appeal to the Council." (Shotter, Exh. A, City Council: Rules of Procedure, § 3). Section 16 of these rules, entitled "Decorum", states:

> A. Each member of the Council shall cooperate with the chair in preserving order and decorum,

and no member shall by conversation or otherwise delay or interrupt the proceedings of the City Council nor disturb ar.y member while speaking, or fail to abide by the orders of the Council or its president, except as specifically peimitted by these rules.

B. Any person who shall disturb the peace of the City Council, make impertinent or slanderous remarks or conduct himself in a boisterous manner while addressing the Council shall be forthwith barred by the presiding officer from further audience before the Council, except that if the speaker shall submit to proper order under these rules, pelniission for him to continue may be granted by a majority vote of the Council.

C. The Police Department shall, upon request, designate a member of the Department to serve as Sergeant-at-Arms at Council meetings. He shall carry out all orders and instructions given by the presiding officer for the purpose of maintaining order and decorum at such meetings.

(Shotter, Exh. A, § 16).

Moreover, under the rules of debate set forth by the City, "[a] member of the Council shall be entitled to the floor only upon recognition by the chair. Once a member has been recognized and has taken the floor, he shall not be interrupted

for any reason other than a call to order." (Shotter, Exh. A, § 13B).[6]

Defendant apparently meets the latter two prongs of this First Amendment inquiry. The government has a significant interest in conducting orderly, efficient, effective and dignified meetings of its public bodies. *Scroggins v. City of Topeka, Kansas*, 2 F. Supp.2d 1362, 1372 (D. Kan. 1998). *See also, City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176 n. 8 (1976) (noting that public bodies obviously must confine their meetings to specified subject matter); *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 271 (9th Cir.

6. Plaintiff seems to lay great emphasis on an inter-office memorandum dated September 26, 2000 setting forth the opinion of attorneys for the City of Elizabeth "that if a member of City Council repeatedly refuses to comply with the orders and rulings of the President, the member of City Council maybe ejected from that particular meting by vote of a majority of those Council members present and voting." (Shotter, Exh. D). Although this memo should not be disregarded, it is important to note that a single legal recommendation does not reach the level of clearly-established law. It is merely one interpretation of the interplay between the City's rules and Robert's Rules of Order. A reasonable person could also believe a majority of the Council is not needed to eject an unruly person, in light of the City's rules that state that boisterous attendees "shall be" barred by the presiding officer, and that place the police at the presiding officer's complete disposal for the purpose of maintaining order. (Shotter, Exh. A, City Council: Rules of Procedure, § 16). As neither party has developed arguments on this issue, this Court feels it suffices to say that the September 26th memo's conclusion is not binding on Defendant Perkins-Auguste, especially in the context of the federal claims asserted against her.

1995) (board has legitimate interest in conducting efficient, orderly meetings); *Jones*, 888 F.2d at 1333 ("[T]o deny the presiding officer the authority to regulate irrelevant debate and disruptive behavior at a public meeting — would cause such meetings to drag on interminably, and deny others the opportunity to voice their opinions.")

In addition, the restrictions appear "narrowly-tailored" as defined by the courts. To be narrowly tailored, the court need not find that the actions were the least intrusive means of behaving. The requirement is satisfied so long as the action "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 798-799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). The analysis does not hinge on the "judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted." *Jones*, 888 F.2d at 1333 (internal citations omitted). Thus, whether this Court would have conducted the meeting in a similar fashion is simply besides the point. *Id.* at 1334 ("An erroneous judgment call on the part of a presiding officer does not automatically give rise to liability for a constitutional tort.") Defendant's approach toward maintaining order in the meeting, if actually designed for that purpose, will not be second-guessed. Finally, alternative avenues of communication undoubtedly existed for Plaintiff Monteiro to express his views outside of that particular venue, such as at future Council meetings, in the press, or otherwise.

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When a restriction on speech is not aimed at its content but the secondary effects generated by or associated with speech, the restriction is considered content-neutral. *Zapach*, 134 F. Supp.2d at 689 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986)). "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791.

Defendant argues that the procedural "rules are content neutral in that they do not restrict a City Council member in regard to his or her expression and opinion on a certain issue but rather they control the agenda and prevent the disruption of the public meeting." (Defendant Patricia Perkins-Auguste's Motion for Summary Judgment, 9). The rules on their face are not based on the Council's disagreement with any particular message nor are they related to any particular viewpoint. However, having examined the submissions of counsel as well as the transcript and videotape of the meeting in question it is unclear to this Court whether Plaintiff was silenced by Defendant Perkins-Auguste based on the content of his speech or based on the need to maintain order at the meeting.

On the one hand, Ms. Perkins-Auguste's actions taken against Plaintiff could be considered her reasonable attempts, consistent with §§ 3, 13B and 16 of the City's Rules, to prevent Plaintiff from continuing to disrupt her and to promote the orderly procession of business. As Defendant stated at her deposition: "As council president it's up to me

to make sure that the other council members stick to the matters at hand, and if I perceive that he or she is going off the subject matter, it's up to me . . . to make sure they stick to the matter." (Shotter, Exh. B, Deposition of Perkins-Auguste, 24). On the other hand, a fact finder hearing the history between the parties, the words that were actually said at the meeting, and viewing Plaintiff's conduct as shown in the videotape, could reasonably conclude that the Plaintiff was not being disruptive and that Ms. Perkins-Auguste's actions were motivated by her antipathy to Plaintiff's particular outspoken views on the budget and his alleged sponsorship of the "offensive" flier that attacked the city's budgetary proposals. Indeed, prior to the event, Defendant was aware of Plaintiff's views and knew that he was going to vote and argue against the budget. (*Id.* at 62). Therefore, material questions of fact exist as to whether Defendant's motive for acting against Monteiro resulted from the content of his speech (constitutionally impermissible) or was an appropriately limited time, place and manner restriction (constitutionally permissible). A rational jury could infer that Defendant Perkins-Auguste singled Plaintiff out because of the content of his speech, or that she was merely trying to maintain order for the efficient administration of her legislative responsibilities. If Ms. Perkins-Auguste's motivation in removing Mr. Monteiro was her animosity towards him and the desire to stifle his views on the budget, then Ms. Perkins-Auguste as a reasonable public official would have known that her specific conduct violated the Plaintiff's clearly established rights and was not subject to qualified immunity. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In as much as these questions must be resolved by a trier of fact and determined, perhaps through the use of

a specifically-tailored jury verdict questionnaire, it would be improper to determine this matter via summary judgment. Therefore, summary judgment is denied as to the First Amendment claims against Defendant Perkins-Auguste.[7]

b. Right to Privacy Claim

Plaintiff also asserts a 'right to privacy' claim that is seemingly founded upon the due process clause of the Constitution. He alleges that issues of fact exist as to whether the public broadcasting of the event in dispute damaged his reputation and caused his loss in the following election.

The Supreme Court has held that a plaintiff's interest in his or her reputation does not implicate a liberty or property interest protected by the Fourteenth Amendment's Due

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7. The Court draws support in its conclusion from *Musso v. Hourigan*, 836 F.2d 736 (2d Cir. 1988). In *Musso*, unruly citizens at a Board of Education public meeting were arrested and removed. In plaintiff's First Amendment claim against a board member, the court found that genuine issue of fact remained as to whether defendant silenced plaintiff because of his disagreement with the content of plaintiff's speech or not and therefore denied summary judgment. *Id.* at 743. *See also Wilkinson*, 822 F. Supp. at 1161 ("We recognize that presiders over public meetings have, as their central duty, the obligation to maintain order and keep the discussion to germane matters. Free expression can quickly be stifled by the din of a free-for-all. On the other hand, citizens have a right, subject to basic restrictions of good order, to be difficult, even offensive to public officials on matters of public concern. There are, however, limits on the duration of invective that a presider and meeting participants must endure. . . . This is, in short, a very difficult line to draw in an area of core First Amendment concerns. It should not be drawn on a summary judgment record.")

Process Clause unless the stigma is accompanied by a tangible deprivation such as the loss of present or future employment. *Paul v. Davis*, 424 U.S. 693 (1976). This is commonly known as the requirement of "stigma plus." *Kadetsky v. Egg Harbor Township Bd. of Educ.*, 82 F. Supp.2d 327 (D.N.J. 2000). Otherwise, the claim is essentially a state law defamation claim improperly dressed in constitutional clothing. *See Siegert v. Gilley*, 500 U.S. 226, 233-234 (1991). *See also Sturm v. Clark*, 835 F.2d 1009, 1012 (3d Cir. 1987) ("Absent the alteration or extinguishment of a more tangible interest, injury to reputation is actionable only under state defamation law.")

Even assuming Plaintiff was stigmatized by Defendants' actions, Plaintiff has asserted no cognizable "plus" that necessitates relief. There is no federally protected right to win election to public office. *Lahaza v. Azeff*, 790 F. Supp. 88 (E.D. Pa. 1992). A claim nearly identical to that of Plaintiff's failed in *Flinn v. Gordon*, 775 F.2d 1551 (11th Cir. 1985). There, a state representative alleged that defendants' release of slanderous accusations of sexual misconduct caused him to lose his attempted re-election. The Eleventh Circuit held that while plaintiff had a constitutional right to run for office and to hold office once elected, it had no constitutional right to win an election. *Id.* at 1554. The court noted the fundamental distinction between expulsion of a public official by the state and the same activity by the voters. *Id. See also Emanuele v. Town of Greenville*, 143 F. Supp.2d 325, 333 (S.D.N.Y. 2001) (noting that courts "have not allowed claims for defamation under 1983 when the allegation is a loss of an election due to allegedly defamatory statements.")

Based on the foregoing reasons, Defendant is granted summary judgment on the right to privacy claim.

D. Claims Against Defendant City of Elizabeth

Plaintiff alleges that the City of Elizabeth should be held liable for the actions of the individual Defendants. There is no respondeat superior liability under §1983. *See Bd. of the County Comm'rs of Bryan County, Oklahoma*, 520 U.S. 397, 403 (1997). Liability against government entities attaches only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury. . ." *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 694 (1978); *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 791 (3d Cir. 2000). Therefore, this Court must determine whether Defendant City of Elizabeth had a "policy" or "custom" that inflicted the alleged constitutional injuries.

Courts in this Circuit will find a "policy" when a "decisionmaker possess[ing] final authority to establish municipal policy with respect to the action issues an official proclamation, policy, or edict." *Kneipp v. Tedder*, 95 F.3d 1199, 1212 (3d Cir. 1996) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986) (plurality op.)). A course of conduct is considered a "custom" when "though not authorized by law, such practices of state officials [are] so permanent and well settled as to virtually constitute law." *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990).

The absence of prior similar incidents by itself does not absolve the city from liability. There are in fact three situations where the acts of a government employee may be deemed to be the result of a policy or custom of the governmental entity so that the entity may be held liable under § 1983. *Natale v. Camden County Corr. Facility*, 318 F.3d 575, 584 (3d Cir. 2003). The situations include where "the appropriate officer or entity promulgates a generally applicable statement of policy and the subsequent act complained of is simply an implementation of that policy." *Id.* (quoting *Bryan County*, 520 U.S. at 417 (Souter, J., dissenting)). Another is where "no rule has been announced as policy but federal law has been violated by an act of the policymaker itself. *Id.* A third situation is where "the policymaker has failed to act affirmatively at all, [though] the need to take some action to control the agents of the government is so obvious, and the inadequacy of existing practice so likely to result in the violation of constitutional rights, that the policymaker can reasonably be said to have been deliberately indifferent to the need." *Natale*, 318 F.3d at 584 (internal citations omitted).

In their summary judgment briefs, the parties did not clearly develop their municipal liability arguments, but merely alluded generally to this framework. However, based on this Court's independent analysis, it appears that the only possible "fit" for Plaintiff's claim is the second of these situations. Plaintiff does not allege any "generally applicable statement of policy" that caused the constitutional violations nor has the Plaintiff pointed to any evidence which could form the basis of a "failure to act" claim against the City of Elizabeth. Therefore, the only issue remaining is whether

the City should be held liable based on the acts of a "policymaker."

Because the only outstanding claims for which the City of Elizabeth could be held liable relate to alleged First Amendment violations by Defendant Perkins-Auguste, the judicial scrutiny is narrowed to whether the City of Elizabeth can be held liable for her acts as President of the City Council. This analysis turns on whether Perkins-Auguste should be considered a "policymaker." Whether a particular official has final policymaking authority is a question of state and local law. *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989). Reviewing the relevant legal materials as well as 'custom or usage' having the force of law, the trial judge must identify those officials who speak with final policy-making authority for the locality concerning the alleged unconstitutional action. *Id.*

A "policy-maker" for purposes of § 1983 municipal liability must be an individual with "final" and "unreviewable" authority to make a given decision. *See Pembaur*, 475 U.S. at 481; *Beck v. City of Pittsburgh*, 89 F.3d 966, 973 n.8 (3d Cir. 1996); *Bielevics v. Dubinon*, 915 F.2d 845, 850 (3d Cir. 1990). The official in question need not be a policy-maker for all purposes. Rather, his or her policy-making role may be confined to a particular area or on a particular issue. *McMillian v. Monroe County, Alabama*, 520 U.S. 781, 785 (1997).

In making her decision to expel Plaintiff from the Council meeting, Defendant Perkins-Auguste did not act as a final policy-maker for the City of Elizabeth. Although the

Appendix D

Rules of Procedure promulgated by the City grant the Council President the authority to rule on questions of order and to recognize who is entitled to speak, the rules specifically state that questions of order are "subject to appeal by Council." (City Council: Rules of Procedure, § 3). The City has expressly refused to give unilateral ultimate authority to the Council President in making these procedural decisions, but has instead given that power to the entire Council. In light of this administrative structure, Defendant Perkins-Auguste's procedural decisions are neither "final" nor "unreviewable."

Plaintiff's counsel apparently admitted to this organizational hierarchy at oral argument. In response to a statement by the Court that Defendant Perkins-Auguste "alone doesn't make policy," counsel asserted "I think that is right." (Transcript, 14). Counsel then stated that "it is my position that the council president did not have the authority to remove Monteiro on her own, which is what, in fact, she did." (Transcript, 16).

It is true that Defendant Perkins-Auguste is given a certain degree of latitude by the Council to make executive decisions. Such latitude is undoubtedly necessary for the efficient operation of the City's public meetings. But as the Supreme Court has noted, "[t]he fact that a particular official ... has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." *Pembaur*, 475 U.S. at 481-482.

At oral argument, Plaintiff also asserted that the City of Elizabeth should be held liable because the Council "acquiesced" to Defendant Perkins-Auguste's decision.

(Transcript, 16). It is true that evidence that a high level policy-maker knew and acquiesced in certain conduct may be sufficient to establish a "custom". *See, e.g., Olender v. Township of Bensalem*, 32 F. Supp.2d 775, 782 (E.D.Pa.1999) (citing *Fletcher v. O'Donnell*, 867 F.2d 791, 793 (3d Cir. 1989)). However, isolated incidents of wrongdoing by non-policymakers are insufficient to establish municipal acquiescence in unconstitutional conduct, so as to support imposition of municipal liability under Section 1983. *See, e.g., Beswick v. City of Philadelphia*, 2001 WL 210292, at *5 (E.D.Pa. 2001). A plaintiff cannot prove a custom simply by citing one instance of the custom asserted. *Fletcher*, 867 F.2d at 793. As Plaintiff in the present case has not offered evidence of any prior constitutional violations by Defendant Perkins-Auguste or other Council members at public meetings, nor provided this Court with any suggestion that anything resembling a "custom" of constitutional violations exists, the argument for such "acquiescence" liability has little merit.

Because Defendant City of Elizabeth cannot be held liable as a matter of law for the acts of Defendant Perkins-Auguste, this Court grants summary judgment as to the City of Elizabeth on all claims.

IV. Conclusion

For the reasons set forth above, it is on this 12th day of November, 2003, hereby: ORDERED that the summary judgment motion of Defendants Andrew R. Cox and Richard Meola is GRANTED as to all claims; and it is

FURTHER ORDERED that the summary judgment motion of Defendant City of Elizabeth is GRANTED as to all claims; and it is

FURTHER ORDERED that the summary judgment motion of Defendant Patricia Perkins-Auguste is DENIED as Plaintiff's First Amendment claims; and it is

FURTHER ORDERED that the summary judgment motion of Defendant Patricia Perkins-Auguste is GRANTED as to all other claims.

DATED: November 12, 2003

s/ Jose L . Linares
JOSE L . LINARES
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED MARCH 6, 2006

No. 04-3756

ARMENIO T. MONTEIRO

v.

CITY OF ELIZABETH; PATRICIA PERKINS-AUGUSTE, Council President; ANDREW R.COX, Police Officer; RICHARD MEOLA, Sergeant of Police

Patricia Perkins-Auguste,
Appellant

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, and ROSENN,* *Circuit Judges*

The petition for rehearing filed by Appellant Patricia Perkins-Auguste in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of

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* The Honorable Max Rosenn, Senior Circuit Judge, died February 7, 2006.

the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Fisher would have granted rehearing en banc.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: 6 March 2006